Supreme Court, U.S.
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No. 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In re WILLIAM M. KUNSTLER,

Petitioner,

ROBESON DEFENSE COMMITTEE, *et al.*,

Plaintiffs,

—v.—

JOE FREEMAN BRITT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William M. Kunstler petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this proceeding on September 18, 1990.

QUESTIONS PRESENTED

1) May a defendant who consents to a motion to dismiss with prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedural, without any conditions or reservations, seek sanctions under Rule 11 forty-five days after the district court has granted the motion to dismiss in the form submitted by the plaintiffs?

2) May a district court, consistent with the Due Process Clause and Rule 56 of the Federal Rules of Civil Procedure, impose in excess of $100,000 in sanctions against three attorneys, on the ground that they filed their complaint for an "improper purpose," and with insufficient factual or legal grounds, without conducting an evidentiary hearing to resolve sharp conflicts in the facts in the affidavits before the court, where the court had no prior judicially acquired knowledge of the case?

PARTIES TO THE PROCEEDINGS

Petitioner William M. Kunstler an appellant in the Court of Appeals, is one of three attorneys-at-law who represented the plaintiffs in the underlying action.[1] Plaintiffs in the underlying action are Robeson Defense Committee,

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[1] Barry Nakell and Lewis Pitts, attorneys who also represented the plaintiffs in the district court and were appellants below, do not join in this petition but will file their own petitions within the period allowed by law.

Carnell Locklear, Mary Sanderson, Thelma Clark, Eleanor Jacobs, Betty McKellar, Eddie Hatcher, and Timothy Bryan Jacobs. The defendants in the underlying action who moved for Rule 11 sanctions against the petitioners and are appellees in the Court of Appeals are: Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Hubert Stone, Lacy H. Thornburg, Robert Morgan, James Bowman, James G. Martin, SBI Doe I, SBI Doe II, SBI Doe III, Deputy Sheriff Doe I, Deputy Sheriff Doe II, Deputy Sheriff Doe III, Deputy Sheriff Doe IV, Deputy Sheriff Doe V, District Attorney Doe I, District Attorney Doe II, District Attorney Doe III, and Robeson County.

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OPINIONS BELOW

The Court of Appeals for the Fourth Circuit issued a decision on September 18, 1990 affirming in part and vacating in part a judgment of the U.S. District Court for the Eastern District of North Carolina which imposed sanctions under Rule 11 on the petitioner and Messrs. Nakell and Pitts, and remanded the case for redetermination of the amount of the award in accordance with its instructions. The opinion of the Court of Appeals is reported at 914 F.2d 507 and a copy is annexed as Appendix A. A copy of the Opinion and Order of the District Court issued September 28, 1989, which is unreported, awarding sanctions in the amount of $122,834.28 against petitioners and Messrs. Nakell and Pitts is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1990. Its order denying petitions for rehearing filed by petitioner and by Messrs. Nakell and Pitts was entered on October 11, 1990. A copy of this order is annexed as Exhibit C. On October 18, 1990 it entered an ordering staying the mandate in the case until November 19, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject

> for the same offence to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Rule 11, Federal Rules of Civil Procedure, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 41((a), Federal Rules of Civil Procedure, in pertinent part:

(a) Voluntary Dismissal: Effect Thereof.

(1) Subject to the provisions of Rule 23(d), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of the Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 56, Federal Rules of Civi Procedure, in pertinent part:

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon

all or any part thereof.

(c) MOTION AND PROCEEDING THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

STATEMENT OF THE CASE

This petition concerns the imposition of Rule 11 sanctions in the amount of $122, 834.28[2] against three attorneys who brought a civil rights action on behalf of members of the minority community of Robeson County, North Carolina, against law enforcement officers of the County and the State. Barry Nakell is a professor at the University of North Carolina School of Law; Lewis Pitts is Director of the Christic Institute South, a public interest law firm located in Carrboro, North Carolina; William Kunstler is nationally known as a lawyer who has espoused unpopular clients in scores of civil and criminal trials. We first summarize the events that led to the filing of the complaint.

Events Preceding the Complaint

On February 1, 1988 two Tuscarora Indians, Eddie Hatcher and Timothy Jacobs, entered the offices of a local newspaper, The Robesonian, and took twenty hostages. Their object was to focus media attention on their previously ignored charges of pervasive corruption and criminal conduct by the chief law enforcement officers of Robeson County, on their personal need for protection from such law enforcement officers, and to obtain a commitment for an investigation by state law enforcement agencies. After negotiations with the Governor's office and a number of local political figures, the Governor agreed that, in return for release of the hostages unharmed, he would establish a Task Force to investigate the District Attorney's Office, the Sheriff's Office, and the local and district offices of the State Bureau of Investigation ("SBI"). It was a crucial part of the agreement that Hatcher and

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[2] The award included a fine of $10,000 against each of the attorneys. The Court of Appeals struck the fines from the judgment and remanded for a redetermination of the remainder.

Jacobs, who expressed fear of the county authorities, could surrender to federal authorities rather than to the county authorities who were the target of their allegations.

Promptly after their surrender, federal indictments were returned against Hatcher and Jacobs. Mr. Britt, the Robeson County District Attorney, thereupon dismissed state kidnapping charges as pre-empted by the federal authorities. On October 14, 1988 after a three week trial the federal jury acquitted the defendants on all counts. Mr. Hatcher then undertook a campaign, with the support of the Robeson Defense Committee, to remove the Sheriff and his son, the Deputy Sheriff, from office. The SBI thereupon began to interview persons connected with the Defense Committee, and newspapers reported statements from the SBI and the District Attorney that the SBI was investigating whether other persons were involved in a conspiracy to take hostages on February 1. The political activity to remove the Sheriff and his son thereupon cooled. Meanwhile the District Attorney announced plans to call on a Grand Jury to reinstate the state charges against Hatcher and Jacobs. Their attorneys, Messrs. Nakell and Pitts, represented to Mr. Britt and to counsel for the Governor that a state prosecution would violate the agreement with the Governor's office that they would not be subject to the Robeson County authorities. Nevertheless, on December 6, 1988, Hatcher and Jacobs were indicted by the Robeson County Grand Jury on kidnapping charges. Both before and after the indictment, Nakell and Pitts protested in meetings, letters and telephone calls with the Governor's Task Force, the Attorney General and other top State officials that the activities of Mr. Britt and the SBI were causing a climate of fear in Robeson County which inhibited the people's exercise of their first amendment rights. Their efforts to have the SBI activities stopped did not succeed.

The Lawsuit

On January 31, 1989 Mr. Nakell filed a complaint under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of North Carolina on behalf of Messrs. Hatcher and Jacobs, the Robeson Defense Committee, and five Native American and Black residents of the County active in the work of the Committee. The complaint named as defendants the District Attorney, Sheriff and other principal law enforcement officers of Robeson County, members of their staffs, the Director and agents of the SBI, and the Governor and Attorney General. As later amended,[3] the complaint recounts a campaign of intimidation of the Defense Committee and sets forth the circumstances that led to the second prosecution. It alleges, *inter alia*, violations of first amendment rights; acts designed to interfere with the attorney-client relationship; initiation of the second prosecution in bad faith; and approval of, or acquiescence in, the alleged constitutional violations by the Attorney General and the SBI Director. The plaintiffs sought an injunction against a continued campaign of harassment of the movement to remove the Sheriff and Deputy Sheriff from office, including interference with the use of public meeting facilities, against continued interference with the attorney-client relationship established by Jacobs, and against the criminal prosecution. They also sought damages against all defendants named in their individual capacity and against Robeson County.

The plaintiffs promptly sought discovery, but all discovery was stayed by the court. On March 29, 1989, the defendants filed motions to dismiss accompanied by affidavits.

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[3] The amended complaint was also signed by Messrs. Pitts and Kunstler.

The record plainly establishes that before filing the complaint counsel had made every effort by discussions with State officials to protect their clients' rights to conduct political activities without official interference, and to protect them from what they considered to be a State prosecution in violation of the agreement which resolved the February 1, 1988, incident.

The Voluntary Dismissal

By April a number of circumstances had coalesced to lead to a judgment that the case should not be prosecuted: a split between Hatcher and Jacobs, who had made a separate plea bargain with the prosecution; the diminished viability of the Robeson Defense Committee and its petition drive to replace the Sheriff and Deputy Sheriff as a result of the chilling of political activities by the SBI; the apparent termination by the SBI of its "conspiracy investigation"; and the frustration caused by the stay of discovery.

Mr. Nakell communicated to the attorney for the defendants the plaintiffs' decision to proceed with a stipulated dismissal with prejudice pursuant to Rule 41(a)-(1)(ii). He was advised that he could represent that the defendants did not object to the dismissal. When he asked whether the defendants would stipulate to the dismissal to avoid the necessity for a court order, he was told it would take time to secure the necessary authority and was requested to proceed instead under Rule 41(a)(2) to which defendants would consent.

Plaintiffs thereupon submitted a motion for dismissal under Rule 41(a)(2) which stated, in accordance with what Mr. Nakell had been advised, that "counsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do not object to the Court granting it." The motion and a proposed order were signed by the district judge on May

2. Neither the motion nor the order contained any terms or conditions of dismissal reserving any right on the part of the defendants to take any further action in the case. Nor did the defendants mention, let alone seek, any such term or condition.

The Rule 11 Motion

On June 13, forty-five days after entry of the order of dismissal, the state defendants filed a Rule 11 motion agains the three attorneys but not their clients. The motion claims that the attorneys acted for an improper purpose and that the complaint had no factual basis and was not well grounded in law. Two weeks later the county defendants also made Rule 11 motions. On August 8 plaintiffs' attorneys moved for an evidentiary hearing. The court did not rule on this motion, and no evidentiary hearing took place. After hearing argument on the Rule 11 motions on September 8, the court, which had held no prior hearings in the underlying case, or made any substantive rulings, invited the defendants to submit statements of their fees and expenses. These were submitted on September 27. On September 29, before plaintiffs' attorneys could respond, the court issued its opinion finding that they had violated Rule 11 and imposing sanctions in the amount of $92,834.28, the exact amount requested in defendants' submission. In addition, the court imposed punitive sanctions of $10,000 against each of plaintiffs' attorneys on the basis of allegedly unwarranted allegations against high-ranking public officials which received notoriety in the press.

Although the parties' affidavits presented sharply conflicting versions of critical facts, the court made its determinations, including evidentiary findings, solely on the basis of the affidavits and other written materials, without listening to a word of testimony or permitting the cross-examination of any affiant or the taking of any deposition to help resolve factual conflicts.

The District Court's Opinion.[4] In its opinion, the court first disposed of petitioners' argument that the dismissal precluded the defendants from bringing a Rule 11 motion on the ground that terms and conditions that may be imposed upon a voluntary dismissal are for the protection of the defendant, and that no such protection is needed when the dismissal, as in this case, is with prejudice. App. B at 43a-44a. The court did not allude to the fact that the defendants had consented to the dismissal without any reservation of rights.

The opinion then addressed the "improper purpose" prong of Rule 11 first because the court is "greatly concerned with the motives of plaintiffs' attorneys and the manner in which they have conducted themselves." *Id.* at 44a. The court concluded that "plaintiffs' attorneys initiated the § 1983 action not to vindicate constitutional rights, but more probably to gain publicity and to influence the State prosecution then underway against Hatcher and Jacobs." *Ibid.* It based this conclusion on speculative inferences from the timing of the suit, the holding of a press conference, the sending of a copy of the complaint to the State court judge likely to preside in the criminal trial, the ability to obtain discovery unobtainable under North Carolina criminal procedure, and "most damning of all, . . . the sudden and inexplicable" voluntary dismissal with prejudice. *Id.* at 47a. The district court also ruled that the complaint had no factual basis and was not well grounded in law.

Opinion of the Court of Appeals.[5] In its opinion the

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[4] We refer here only to those portions of the opinion which are relevant to this petition.

[5] Here, again, we refer only to those portions of the opinion relevant to the petition.

Court of Appeals upheld the ruling of the court below that Rule 11 sanctions were not precluded by the dismissal on the grounds that the present case did not involve a stipulated dismissal but one under Rule 41(a)(2) and petitioners were not prejudiced by the delay in filing the motion. App. A at 7a-10a. The Court of Appeals also upheld the District Court's finding of "improper purpose," although commenting that a court should consider the first two prongs of Rule 11 before making such a determination. *Id.* at 21a-27a. On the issue of whether an evidentiary hearing is required to make a finding of "improper purpose," the Court of Appeals held that the failure to hold such a hearing did not violate due process. *Id.* at 27a-30a. It stated:

> Although the number of credibility findings which the court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.
>
> The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing. The district court had before it the pleadings, the summary judgment motions of the state defendants and the 12(b) motion of the county defendants. We also find that counsel were given an adequate opportunity to contest the court's determination that Rule 11 was violated. The district court allowed appellants to submit affidavits, and voluminous written legal arguments. The district judge also heard oral argument. We find that due process requirements were satisfied by the

> opportunities appellants were given to respond to the charges that their complaint violated Rule 11.

App. A at 29a-30a.

The failure of the district court to hold an evidentiary hearing is punctuated by the fact that, although the county defendants filed a separate Rule 11 motion alleging different grounds than the state defendants and requiring different responses from petitioners, the court never ruled on the county defendants' motion. Accordingly it had no basis to award sanctions to the county defendants for their costs and attorney's fees.

REASONS FOR GRANTING THE WRIT

A. THE HOLDING OF THE COURT OF APPEALS THAT A DISTRICT COURT MAY ENTERTAIN A MOTION FOR RULE 11 SANCTIONS MADE FORTY-FIVE DAYS AFTER A VOLUNTARY DISMISSAL WITH PREJUDICE UNDER RULE 41(a)(2) WHEN THE ORDER OF DISMISSAL IS MADE ON CONSENT OF THE DEFENDANT WITHOUT ANY RESERVATION OF THE RIGHT TO PROCEED UNDER RULE 11 CONFLICTS WITH THE DECISIONS OF ALL OTHER CIRCUITS AND INTRODUCES UNCERTAINTY INTO THE APPLICATION OF THE RULES PROMULGATED AND ADMINISTERED BY THIS COURT.

In June of this year this Court decided *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), which dealt with the power of a court to award Rule 11 sanctions after a voluntary dismissal by the plaintiff under Rule 41(a)(1)(i). The situation presented by this petition is entirely different. In *Hartmarx Corp.* this Court dealt with the question whether a plaintiff could unilaterally escape the consequences of filing a frivolous complaint by dismissing it before the defendant had answered or moved for summary judgment. A Rule 41(a)(1)(i) dismissal is a unilateral action by a plaintiff as to which neither the

defendant nor the court has any input. Such unilateral action is not possible after the filing of an answer or a motion for summary judgment as in this case. In such a circumstance, voluntary dismissal must proceed under Rule 41(a)(1)(ii) or 41(a)(2), both requiring input by the defendant and, in the case of 41(a)(2), approval by the court. The considerations applicable to dismissal under these paragraphs are thus wholly different from the considerations where a plaintiff acts unilaterally as in *Hartmarx Corp.*

The appellate decisions in all other circuits, and a number of district court decisions as well, have uniformly held that where a plaintiff has moved for dismissal under Rule 41(a)(2), and an order of dismissal with prejudice is entered upon consent of the defendant, without any term or condition reserving the defendant's right to move for Rule 11 sanctions, the district court may not grant such sanctions in response to a motion made subsequent to the dismissal. These decisions are not grounded on the loss of jurisdiction by the district court after a dismissal with prejudice, but upon the concept of "fundamental fairness" to the plaintiff, who would otherwise be trapped into a dismissal upon conditions that he did not contemplate when he filed his motion. The least that is required is that such circumstances the plaintiff should retain the option to withdraw his motion and proceed with the lawsuit.

This rationale applies equally to a stipulated dismissal under Rule 41(a)(1)(ii) when the defendant has consented to the dismissal without any reservation of rights, and to a dismissal under Rule 41(a)(2) when the order does not include any "terms and conditions." The present case partakes of both situations. Plaintiffs originally sought a dismissal with prejudice pursuant to stipulation under Rule 41(a)(1)(ii). The defendants said they had no objection and that the plaintiffs' attorneys could so represent to the court, but preferred that the plaintiffs proceed by way of

a motion for a court order under Rule 41(a)(2). Their consent to the dismissal was given without any reservation of the right to move for Rule 11 sanctions or any indication that they were considering such a motion.[6] The plaintiffs' motion papers under Rule 41(a)(2) stated that "counsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do no object to the Court granting it." In signing the proposed order submitted by the plaintiffs, the district judge knew that he was signing a consent order. The proposed order did not contain any terms or conditions, and the judge did not insert any.

Stipulated Dismissals. In *Barr Laboratories, Inc. v. Abbott Laboratories*, 867 F.2d 743 (2nd Cir. 1989), the court of appeals held that "fundamental fairness" mandated the denial of the defendant's Rule 11 motion after a stipulated dismissal when the defendant's attorney had given no indication that Rule 11 sanctions would be sought. Under these conditions, it stated that

> we have no hesitancy in saying that it would be manifestly unfair to award sanctions against Barr and in enunciating a rule that would prohibit a motion for Rule 11 sanctions after the execution of a stipulation of dismissal without a reservation in the stipulation of the right to move for such relief.

867 F.2d at 748. The stipulation had been "So Ordered"

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[6] The Rule 11 motion was not made until 45 days after the dismissal. It clearly violated the obligation of a party seeking sanctions to give notice to the court and the offending party promptly upon discovery of the basis for doing so. Advisory Committee Notes, Rule 11; see, e.g., Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 879 (5th Cir. 1988) (in banc).

by the district judge although his approval was not required under Rule 41(a)(1)(ii). It is difficult to discern any practical distinction between a "so ordered" stipulation of dismissal without a reservation of rights and a dismissal order signed on consent without such a reservation. The procedural difference does not alter the unfairness.

Dismissal with Terms and Conditions. Where a voluntary dismissal is sought by motion under Rule 41(a)(2), the court is empowered to include in its order such "such terms and conditions as the court deems proper." Where the order contains no terms or conditions, it is improper to grant a motion for Rule 11 sanctions or the assessment of costs and attorney's fees where the dismissal is with prejudice. *Colombrito v. Kelly*, 764 F.2d 122, 133-35 (2nd Cir. 1985) (where lawsuit voluntarily dismissed *with prejudice* under Rule 41(a)(2) attorney's fees have almost never been awarded although such an award might be one of the appropriate "terms or conditions" authorized by the Rule). The reason is that a plaintiff must remain free to accept or reject an order of dismissal containing conditions to which he has not agreed. *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986)(per curiam), holding reaffirmed in *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 554-55 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 85 (1987). In *Lau* the court stated that the plaintiff has

> a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions.

792 F.2d at 931.

In an earlier case, even the Fourth Circuit acknowledged that where a plaintiff applied for a dismissal *without* prejudice, the district court may not order a

dismissal *with* prejudice. *Andes v. Versant Corp.*, 788 F.2d 1033 (4th Cir. 1986). In reversing, the court of appeals stated:

> It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing *with* prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy. The plaintiff here deserved such notice and an opportunity to proceed with the litigation of this case.

788 F.2d at 1037.

In accordance with the principles set forth above, it has become the general practice for defendants wishing to preserve their right to move for Rule 11 sanctions or for attorney's fees to respond to a Rule 41(a)(2) motion with an appropriate cross-motion. *E.g., Greenberg v. Hilton Int'l. Co.*, 870 F.2d 926, 932-33, *reh'g granted rem'd on other grounds*, 875 F.2d 39 (2nd Cir. 1989); *Kya-Hill v. Davidson*, No. 87 CIV. 7802 (JES) (S.D.N.Y. Oct. 12, 1988 (twenty days granted in which to file Rule 11 motion after court-ordered dismissal);[7] *Dooley v. International Paper, Inc.*, No. 83 CIV. 6070 (SWK) (S.D.N.Y. Feb. 29, 1984) (thirty days granted in which to file Rule 11 motion after court-ordered dismissal). Contrariwise, Rule 11 motions filed after a Rule 41(a)(2) dismissal without a reservation of rights have been routinely denied. *E.g., Roe v. Operation Rescue*, No. 88-5157 (E.D. Pa., June 19, 1989); *Feldman v. Village of Lombard*, No. 86 C 3295 (N.D. Ill. 1987) (consent, as in this case, to 41(a)(2) dismissal without

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[7] All unreported decisions may be found in Lexis, GenFed, Courts.

reservation held to waive right to seek Rule 11 sanctions.)[8]

If the defendants in this case, in consenting to a dismissal with prejudice, had communicated to plaintiffs' attorneys an intention to seek Rule 11 sanctions after dismissal, or if the district court had reserved such a right to defendants as a term or condition of the dismissal order, then plaintiffs would have been in a position to reconsider their decision to dismiss. Indeed after the Rule 11 motions were filed counsel for the plaintiffs had filed affidavits stating that they would not have dismissed but would have litigated if they had been told that a Rule 11 motion was contemplated. Counsel were blindsided, just as counsel for a defendant in a civil rights lawsuit would be blindsided if after a settlement and a consented to dismissal under Rule 41(a)(2), the plaintiff's counsel applied for counsel fees under 42 U.S.C. §1988. The "fundamental unfairness" of this procedure should be corrected by this Court. If not, the decision below will inject confusion into what has become a useful and widely accepted accommodation between the rights of plaintiffs and defendants where Rule 11 and Rule 41(a)(2) intermesh.

B. DUE PROCESS AND RULE 56 MANDATE THAT FINDINGS UNDER RULE 11 OF IMPROPER PURPOSE, INADEQUATE FACTUAL INVESTIGATION, OR LACK OF

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[8] The circumstances are comparable to those in *Evans v. Jeff D*, 475 U.S. 717, 726 (1986), holding that a district court may not modify the terms of a settlement negotiated between the parties in a class action under Rule 23(e) by striking a waiver of costs and attorney's fees and otherwise approving the settlement. *Cf. Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985) (plaintiff may not reopen case to challenge fee waiver in stipulated consent decree). "A defendant in a civil rights case, as in other actions, is entitled to know, *at the time of settlement*, the full implications of that settlement including the total out of pocket cost." 757 F.2d at 439 (emphasis in original).

SOUND LEGAL BASIS FOR THE SUIT MAY NOT BE MADE SOLELY ON THE BASIS OF AFFIDAVITS WITHOUT AN EVIDENTIARY HEARING WHERE THE AFFIDAVITS SET FORTH SHARPLY CONFLICTING VERSIONS OF CRUCIAL FACTS AND QUESTIONS OF CREDIBILITY ARE PRESENTED AND WHERE THE COURT HAS NO PRIOR JUDICIALLY ACQUIRED KNOWLEDGE OF THE SUBSTANCE OF THE CASE.

It is unquestioned that proceedings under Rule 11 are subject to constitutional requirements of due process. As stated in the leading case of *Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987):

> Courts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful; due process must be afforded.

803 F.2d at 1280. *Accord, Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987) (in banc opinion) (attorneys and clients facing possible discipline under Rule 11 have interests qualifying for protection under the Due Process Clause of the Fifth Amendment). While due process requires, at a minimum, notice and an opportunity to be heard, it does not necessarily mean that an evidentiary hearing must be held. As stated in the Advisory Committee Note accompany Rule 11:

> In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be needed.

This comment is quoted in a number of Rule 11 opinions, *e.g., Oliveri v. Thompson, supra,* at 1280; *Donaldson v.*

Clark, supra, at 1562.[9]

The present case is not a typical Rule 11 case. The judge had not participated in any proceedings prior to the Rule 11 motion. He had stayed all discovery by plaintiffs without explanation. He had not held any hearings on the defendants' motions to dismiss and for summary judgment. He had signed without comment or modification the consent dismissal order set before him. Thus he entered the Rule 11 proceeding without any prior knowledge of the case. Yet in his opinion he plunged directly into the third prong of Rule 11, - improper purpose - without prior consideration of the first and second prongs - whether the complaint was well-grounded in fact and law -[10], and proceeded to find, on the basis of speculative inferences and despite conflicting affidavits, that petitioner had filed the complaint with an improper purpose. Only then did he take up the question whether the complaint was well grounded in fact and law, as to which he ruled against petitioner.

A number of cases have noted that where Rule 11 sanctions are based on bad faith rather than an unfounded complaint or motion, or questions of credibility are involved, due process does require an evidentiary hearing.

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[9] The court in *Donaldson* noted that the court frequently may be able to evaluate the Rule 11 issue in the course of examining and ruling on the factual and legal merits of a motion to dismiss or for summary judgment without any further proceedings. *Id.* at 1561, n.13.

[10] This order of determination was criticized by the court of appeals, App. A at 21a, presumably for the reason that a complaint that is well grounded in fact and law does not violate Rule 11 even if it is filed for purposes of harassment or other "bad" motives. *E.g., Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1988).

Invst Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir. 1987); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206; *cf. Donaldson v. Clark, supra*, 819 F.2d at 1561 (risk of erroneous imposition of sanctions under limited procedures when court asked to resolve an issue of credibility).

No precedent holds that a court may rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts.

A single example will illustrate the fallacy of this procedure. The injunction which the plaintiffs sought against prosecution of the state indictment against Hatcher and Jacobs was based not only on a legal claim of double jeopardy but on the factual claim that the state prosecution violated the agreement with the Governor pursuant to which Hatcher and Jacobs had surrendered to the federal authorities. This claim, which was disputed by the defendants, presented a sharp factual issue which could not be properly determined without an evidentiary hearing, particularly in light of the fact that the district court had stayed all discovery. But without a determination of this issue, or at least an assessment of the evidence supporting the claim, how could the district court properly find that the claim had been made with an improper purpose?

Suppose that in this case the district court had endorsed on the dismissal order a condition reserving the defendants' right to move for Rule 11 sanctions, as it had the discretion to do, and that the plaintiffs had then withdrawn their motion, as they had the right to do. The case would then have proceeded to a hearing on the defendants' summary judgment motion. Could the court then have decided the conflicting factual issues contained in opposing affidavits and granted summary judgment in

defendants' favor without allowing testimony and cross-examination? This would be an unthinkable deprivation of due process rights as well as rights under Rule 56. Are attorneys in a Rule 11 proceeding, in which sanctions may not only subject them to a large financial loss but seriously damage their professional reputation, to have less Fifth Amendment and Rule 56 protection against unfounded summary judgments than ordinary citizens?[11] Rule 56 may very well have to be molded to apply to proceedings under Rule 11, but its fundamental postulate that summary judgment is not available when there are contested issues of fact is just as applicable to Rule 11 proceedings as to the underlying proceedings.

We submit that it is quite remarkable that the Court of Appeals sustained the lower court's ruling denying an evidentiary hearing after it concluded that

> The number of credibility findings which the Court made without an evidentiary hearing should have suggested to the Court that an evidentiary hearing would have been of value.
> *Supra*, p. 7.

The suggestion of the Court of Appeals that the issue which might have required a hearing went only to the question of purpose ignores the fact that equally contested issues related to the findings of inadequate factual inquiry, and that the complaint was not well grounded in law or a good faith argument for extension, modification, or reversal of existing law.

Indeed, the panel's opinion because it ignored the

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[11] Rule 56 on its face applies to any party seeking to recover on a claim. This would seem to encompass claims under Rule 11 and in this case it can hardly be said "that there is no genuine issue as to any material facts."

need for a hearing is a caricature of the record as to whether the complaint was well grounded in fact and whether the attorneys had made a reasonable investigation. It is undisputed that Messrs. Nakell and Pitts were entirely steeped in the facts of the case and had made a thorough investigation. The papers filed in response to the claim that their pleading had no basis in fact included a massive collection of affidavits, correspondence, court papers, and materials showing the political efforts to rid the county of the Sheriff, and the blatant efforts of officialdom to interfere with those efforts.

The question whether the Governor, through his aides, had indicated, explicitly or implicitly a "no Robeson County prosecution" understanding to Mr. Hatcher during the course of the negotiations was an important factual issue, Mr. Hatcher contending there was such an understanding, the Attorney General for the Governor's office contending there was not. It is obvious that the only way to resolve this conflict was for the plaintiffs to proceed to discovery of all members of the Governor's staff, the Attorney General and his staff, and all political figures who had dealt with Hatcher in negotiations who would have any information with respect to this matter. Discovery, however, was prevented by the Court.

The Court of Appeals finds "no factual or legal basis for the double jeopardy claim," citing *Heath v. Alabama*, 474 U.S. 82 (1985). It then acknowledges that there is a "tool of the same authorities exception," citing *Bartkus v. Illinois*, 359 U.S. 121 (1959). The Court of Appeals was convinced, however, by allegations in the complaint that no such circumstances exist in this case.

What kind of responsible lawyer is it who would not make a claim and try by discovery to establish a nexus between State and Federal Prosecutors? Is not this exactly the kind of "creativity" and enthusiasm which Rule 11 is not supposed to throttle?

The Court's finding that *Younger v. Harris*, 401 U.S. 37 (1971), barred injunctive relief in this case is based on the Court's statement that "we agree that plaintiffs had no factual basis for claiming that the State prosecution was brought in bad faith." How can the Court say that when Hatcher's counsel had been denied any opportunity to explore by discovery the content of the complex negotiations between Hatcher and the various State officials and politicians to whom he had spoken and the communications they had among themselves?

This Court has not heretofore addressed the question how much process is due to a respondent o a Rule 11 motion. The seriousness of this issue is revealed in this case where the Court acted without any appropriate fact finding procedure to protect the constitutional rights of the petitioner to due process. It is clear that the due process question or the Rule 56 principle as presented by this case are important questions which should be settled by this Court.

In the very recent case of *Jones v. Pittsburgh National Corporation*, 800 F. 2d 1350 (3rd Cir. 1990) the court dealt with what was encompassed within the right to respond in a Rule 11 proceeding said the Court. Said the Court:

> Given the permutations inherent in fee applications and response thereto, any rigid rule would, to say the least, be undesirable. The circumstances must dictate what is required. In some cases an oral response may be sufficient, while in others an opportunity to file a written response must be accorded. However, it does not follow, in either case, that further proceedings are automatically unnecessary. *See Donaldson v. Clark*, 819 F.2d 1551, 1560-61 (11th Cir. 1987) (en banc). Rather, we think a district court in the exercise of its sound discretion must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution requires

> further proceedings, including the need for an evidentiary hearing. *See Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53-54 (2d Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S. Ct. 1373, 94 L.Ed.2d 689 (1987); G. Joseph, Sanctions: The Federal Law of Litigation Abuse §17(d) (2)(1989).
>
> We believe the rule that we have announced has several factors to commend it. It gives the judge flexibility in deciding on the sound course to pursue. Thus, it permits some cases to be disposed of on the record and, to that extent, prevents unnecessary expenditure of judicial time. In other situations it mandates an evidentiary hearing to resolve disputes of material fact when the cold record may not disclose the full story, as here.

899 F.2d at 1358-59.

The position of the 3rd Circuit in Jones is clearly in conflict with that of the 4th Circuit as enunciated and applied in this case. Thus there is an additional basis for the court's granting this petition so as to resolve a conflict among the circuits.

CONCLUSION

For the reasons stated, petitioners respectfully request that this petition be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2815

In RE: WILLIAM M. KUNSTLER; In Re: BARRY NAKELL; In Re: LEWIS PITTS,

Appellants,

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS,

Plaintiffs,

versus

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY;,

Defendants - Appellees,

THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS; NORTH CAROLINA CIVIL LIBERTIES UNION;

NORTH CAROLINA ACADEMY OF TRIAL LAWYERS; NATIONAL LAWYERS' GUILD, North Carolina Chapter,

Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Malcolm J. Howard. District Judge. (CA-89-6-3-CIV-H)

Argued: June 5, 1990 Decided: September 18, 1990

Before CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Affirmed in part, vacated in part and remanded with instructions by published opinion. Judge Chapman wrote the opinion, in which Judge Wilkinson and Judge Wilkins joined.

ARGUED: Morton Stavis, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Appellants. David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. ON BRIEF: George Cochran, Law Center, University, Mississippi; Jerold Solovy, Laura Kaster, JENNER & BLOCK, Chicago, Illinois, for Appellants. Lacy

H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Steven C. Lawrence, ANDERSON, BROADFOOT, JOHNSON & PITTMAN, Fayetteville, North Carolina, for Appellees. Jonathan D. Sasser, MOORE & VAN ALLEN, Durham, North Carolina; Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Amici Curiae North Carolina Civil Liberties Union, The North Carolina Academy of Trial lawyers, and The North Carolina Association of Black Lawyers. J. Phillip Griffin, Jr., Durham, North Carolina; Sherri Zann Rosenthal, Durham, North Carolina; Katherine A. Hermes, Law Student, Durham, North Carolina, for Amicus Curiae North Carolina Chapter of the National Lawyers Guild. Daniel J. Popeo, Richard A. Samp, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae The Washington Legal Foundation, U.S. Senator Jesse Helms, U.S. Representatives Howard Coble and J. Alex McMillan, and The Allied Educational Foundation.

CHAPMAN, Circuit Judge:

Three attorneys appeal the award of Rule 11 sanctions against them in the amount of $122,834.28. Appellants were sanctioned following the dismissal of a 42 U.S.C. § 1983 action, in which they represented certain plaintiffs seeking monetary damages and injunctive relief from the Governor of North Carolina, a number of North Carolina district attorneys, a sheriff, certain State Bureau of Investigation officers, the State Attorney General and others for an allegedly improper state criminal prosecution and harassment. We affirm in part, vacate in part, and remand with instructions.

I

The appellant attorneys are Barry Nakell, a professor at the University of North Carolina School of Law; Lewis Pitts, Director of the Christic Institute South, a public interest law firm in Carrboro, North Carolina; and William Kunstler, a nationally known civil rights attorney. The § 1983 action was connected with the appellants' earlier representation of two American Indians, Eddie Hatcher and Timothy Jacobs, in a federal criminal case.

On February 1, 1988, Hatcher and Jacobs staged an armed takeover of The Robesonian, a local newspaper in Robeson County, North Carolina. Hatcher and Jacobs held twenty hostages and charged the State District Attorney and the Sheriff's Office with corruption and criminal misconduct. Hatcher and Jacobs surrendered to federal authorities in exchange for a promise that a Governor's Task Force would investigate their complaints. The Task Force ultimately announced that it had found no evidence to support Hatcher's and Jacobs' charges.

Hatcher and Jacobs were acquitted of federal criminal charges on October 14, 1988, but North Carolina District Attorney Joe Freeman Britt announced that Hatcher and Jacobs might face state indictments. Soon after that announcement, Hatcher began a petition drive seeking to have Hubert and Kevin Stone removed from the Sheriff's Office. The Robeson Defense Committee, which had supported Hatcher in his federal trial, supported the petition drive. In November 1988, newspaper reports indicated that the State Bureau of Investigation (SBI) was investigating whether there had been a conspiracy in the takeover of The Robesonian.

Appellants Barry nakell and Lewis Pitts contacted the Attorney General's office to express their concern that SBI

agents would intimidate citizens who were working with Hatcher in the petition drive. The Attorney General responded that no action would be taken by his office because he did not believe that the SBI was engaged in any abuse of process. Attorney Nakell alleges that the Deputy Attorney General orally admitted that the decision was political.

Attorney Pitts volunteered legal assistance to anyone on the Robeson Defense Committee subjected to harassment because of their participation in the petition drive. Appellants allege that six members of the Defense Committee contacted Attorneys Pitts and Nakell with claims of harassment by SBI agents and the Sheriff's Department, primarily involving surveillance and questioning.

On December 6, 1988, Hatcher and Jacobs were indicted on state charges. After the indictment, Jacobs fought extradition from New York. Hatcher was in federal custody in California.

By late December 1988, appellants contend that they believed that Jacobs' extradition, the pending state prosecutions, and an alleged pattern of activity by the District Attorney on his staff, members of the Sheriff's Department, and the SBI raised constitutional concerns which could only be resolved by a civil suit, because public officials were unresponsive. Appellants contend that they also believed that there was an illegal campaign to split Jacobs from Hatcher, and to interfere with Jacobs' right to counsel by persuading him to hire local counsel.

Attorney Pitts and Nakell contend that they initially refrained from filing the complaint in hopes of enhancing Jacobs' plea bargaining opportunities, but Mr. Nakell filed the complaint on January 31, 1989, the eve of the one-year anniversary of the armed takeover of The Robesonian, and

he called a press conference to announce the filing. An amended complaint, signed by all three appellants, was filed on March 16, 1989.

The suit named eight plaintiffs, including various members of the Robeson Defense Committee, and Jacobs and Hatcher. The thirty-page amended complaint names nineteen defendants, including two district attorneys and members of their staffs, five SBI agents, the SBI Director, the Sheriff of Robeson County and five Deputy Sheriffs, the Attorney General of North Carolina, and the Governor of North Carolina. The complaint alleges First Amendment and Sixth Amendment violations concerning an alleged campaign of intimidation of political activity, and efforts to induce Jacobs to testify against Hatcher. All defendants were sued in their official and individual capacities, except the Governor, who was named only in his official capacity in a count seeking an injunction against extradition. The complaint also sought injunctions against the pending state criminal prosecutions, and against the defendants' harassment and interference with the attorney-client relationship established by Jacobs. The complaint sought damages against all individually named defendants and Robeson County.

After the case was filed, appellants sought expedited discovery to depose defendant SBI agent Bowman, who was the case agent in the state's pending criminal action against Jacobs and Hatcher. The defendants moved for a protective order claiming that discovery was improperly sought to obtain information concerning the state criminal proceedings, which plaintiffs could not otherwise obtain. The district court did not rule on this motion prior to the dismissal of the case. In late March 1989, Jacobs, having failed in resisting extradition, was returned to North Carolina. In April, Jacobs agreed to a plea bargain. Appellants contend that a variety of events then caused them to reevaluate the

viability of their civil suit, and to conclude that dismissal was appropriate.

On April 20, Mr. Nakell called Joan Byers, a Special Deputy Attorney General, seeking defendants' approval to a stipulated dismissal under Rule 42(a)(1)(ii). Byers would not stipulate to a dismissal under Rule 41(a)(1), but authorized appellants to state that defendants did not object to a dismissal under Rule 42(a)(2). Appellants proceeded under Rule 42(a)(2), and the order dismissing the case was entered on May 2, 1989.

On June 13, 1989, the state defendants filed their Rule 11 motion, and the county defendants filed a similar motion for sanctions on July 5. On August 8, appellants responded to the Rule 11 motions and requested an evidentiary hearing. On September 5, appellants filed a Rule 11 motion seeking sanctions against the appellees. On September 8, the court heard arguments of counsel and shortly thereafter requested submissions by defendants' counsel of their fees and expenses. On September 29, the district court imposed Rule 11 sanctions upon appellants, and dismissed appellants' Rule 11 motion. Sanctions against appellants included full fees and costs of $92,834.28 and $10,000 additional sanctions against each appellant based upon the baseless claims which appellants had taken care to publicize. We affirm the district court's findings that appellants violated all three prongs of Rule 11, but vacate and remand for reconsideration of the appropriate sanction.

II
SANCTIONS AFTER DISMISSAL

Initially, we must determine whether the defendants' failure to notify the plaintiffs or the court prior to dismissal that defendants intended to file a Rule 11 motion should

have precluded consideration of the Rule 11 motion. Appellants cite Barr Labs., Inc. v. Abbott Labs., 867 F.2d 743 (2d Cir. 1989), where the Second Circuit affirmed the denial of a Rule 11 motion filed after a stipulated dismissal under Rule 41(a)(1)(ii). There, the defendant's attorney did not indicate an intention to seek Rule 11 sanctions prior to dismissal and implied in a letter to plaintiff's counsel, prior to the dismissal, that sanctions would not be sought if the case were voluntarily dismissed. The Barr court enunciated a rule "prohibit[ing] a motion for Rule 11 sanctions after the execution of a stipulation of dismissal without a reservation of the right to move for such relief." 867 F.2d at 748.

The present case is different from Barr because it does not involve a stipulated dismissal, which requires opposing counsel to sign the dismissal order. We have a dismissal under Rule 41(a)(2), which does not require a stipulation by the defendants. No court has adopted a rule prohibiting a motion for Rule 11 sanctions after a dismissal with prejudice under Rule 41(a)(2). In addition, unlike Barr, there is no evidence that defendants indicated that they would not pursue Rule 11 sanctions. We decline to extend Barr to dismissals under Rule 41(a)(2).

Appellants also argue that since Rule 42(a)(2) specifies that dismissal is subject to such "terms and conditions as the court deems proper," the potential for Rule 11 sanctions should be stated by a defendant as a condition to a dismissal. We disagree. Rule 41(a)(2) does not require the defendant or a court to indicate the possibility of Rule 11 sanctions as a "term or condition" of a plaintiff's dismissal. Recently, in Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2456 (1990), the Supreme Court hypothesized that even a Rule 11 sanction which prohibited refiling a complaint dismissed without prejudice under Rule 41(a)(1) would not be a "term or condition" placed upon the dismissal. Waiver of a Rule 11 motion may not be a condition to dismissal

because a decision not to dismiss may not prevent the imposition of sanctions for an improvidently filed complaint. "As the 'violation of Rule 11 is complete when the paper is filed,' a voluntary dismissal does not expunge the Rule 11 violation." Id. at 2455 (quoting Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987), cert dismissed, 485 U.S. 901 (1988).

There may be circumstances under which Rule 11 sanctions should not be granted after the voluntary dismissal of a case, i.e., a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after the dismissal. "Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be a lengthy delay prior to their imposition." Hartmarx Corp., 110 S.Ct. at 2457. However, these considerations are equitable, and must be resolved on a case by case analysis. The party seeking sanctions may avoid such problems by notifying his opponent and the court of his intention to pursue sanctions at the earliest possible date.

As the Supreme Court has recently confirmed, there is no jurisdictional bar to the imposition of sanctions after a voluntary dismissal.

> In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other papers is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action.

Hartmarx Corp., 110 S.Ct. at 2455. "[T]he only time limitation . . . [in filing Rule 11] arises out of . . . equitable considerations." Hicks v. Southern Maryland Health Systems

AGency, 805 F.2d 1165, 1167 (4th Cir. 1986). The defendants filed their motion six weeks after the Rule 41(a)(2) dismissal, the appellants were not prejudiced by appellees' delay in filing, and the district court's consideration of the motion was proper.

III
VIOLATIONS OF RULE 11

Rule 11 states, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase int eh cost of litigation. . . .If a pleading, motion, or other papers is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper,s including a reasonable attorney's fee.

The district court found that the three appellants violated all three prongs of Rule 11 by failing to make a reasonable inquiry to determine that complaint stood well grounded in fact and warranted by existing law, and by filing the complaint for an improper purpose. We review all aspects of the district court's Rule 11 determinations under an abuse-of-discretion standard. Cooter & Gell v. Hartmarx Corp. 110 S.Ct. at 2460; Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986).

A. Mr. Kunstler's Liability

Before reviewing the specific violations of Rule 11 found by the district court, we note that Mr. Kunstler's affidavit states that he "did not actively participate in the instant litigation, relying on Prof. Barry Mr. Nakell, who wa son the scene, to prepare and file it." (Emphasis added.) The district court stated that "[i]n light of the serious allegations in the complaint, Mr. Kunstler's total reliance on other counsel is itself a violation of Rule 11." This finding is supported by a recent pronouncement of the Supreme Court. Mr. Kunstler's reliance on others was indeed an improper delegation of his responsibility under Rule 11 to certify that the pleading filed over his name was well grounded in fact and in law.

> The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S.Ct. 456, 459 (1989).
[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility." Id. at 460. Having failed in his responsibility, Mr. Kunstler may not now be heard to protest that he does not share in any violations of Rule 11 which are evident on the face of the complaint.

B. Well Grounded in Fact

The district court based sanctions in part on a violation of the first prong of Rule 11 - finding that the complaint was not well grounded in fact. An objective test is used "to

determine the reasonableness of a lawyer's prefiling investigation." Stevens, supra, 789 F.2d at 1060. "Blind reliance on the client is seldom a sufficient inquiry." Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986). Mr. Nakell and Mr. Pitts have argued that they had "an intimate knowledge of the county and its people; factors which made them ... professionally capable of assimilating and weighing the facts gathered prior to filing the civil suit." In light of that knowledge, the factual inaccuracies in the complaint are even more egregious.

The district court noted numerous misstatements of fact, such as the assertion that the district attorney "serves as the criminal prosecution arm of Defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Defendant Robeson County." In fact, N.C.G.S. §§ 7A-61 et seq. indicates that the District Attorney is an officer of the state, not an agent nor an employee of the county. Contrary to the complaint, defendants Britt, Townsend, and Sampson, and the District Attorney's staff, are state officers, not agents or employees of Robeson County.[1] The complaint alleges that District Attorney Britt refused and failed to discipline, train and supervise the Sheriff's deputies "under their control and supervision." District Attorneys possess no such power or responsibility.

Appellants acknowledge some errors, but contend they are "isolated" and thus do not warrant sanctions. We do not agree with this characterization. The errors pervade the complaint and concern information which either was or

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[1]Although the district court noted that appellant Pitts appeared to make similar misstatements in Waller v. Butkovich, 584 F. Supp. 909, 935 n.5 (M.D.N.C. 1984), it does not appear that counsel was sanctioned in that case, and we do not consider Pitts' conduct in Waller in affirming the award of sanctions in this case.

should have been known to appellants. The errors provide a false foundation for appellants' allegation of a county-wide "conspiracy," and are central to the complaint. Appellants also suggest that, under Pembaur v. Cincinnati, 475 U.S. 469, 484-85 (1986), state official can sometimes establish county policy for purposes of § 1983 liability. Unlike Pembaur, there is no provision of North Carolina law which suggests that the state officials in this case either could or did act to establish county policy.

Other causes of action were founded on allegations which utterly lacked any basis in fact. For example, the complaint alleged that the Governor, the Attorney General and District Attorney entered into a "no state prosecution" agreement, and this agreement was breached when the state prosecution commenced. The district court found that prior to filing their complaint, appellants

> had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement . . . or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not fact North Carolina charges, and none of the negotiators had the authority to so agree.

Moreover, North Carolina law does not grant the Governor or the State Attorney General the power to bind the state not to prosecute. Neither the Attorney General nor District Attorney Britt played any role in the hostage negotiations, but appellants now argue that unspecified evidence, obtainable through discovery, "could show" that a no prosecution agreement was made. While a lawyer may rely on discovery to reveal additional facts to support claims which are well grounded in fact, Rule 11 sanctions are appropriate when a lawyer attempts to use discovery to support outrageous and frivolous claims for which there is

no factual support. Unsubstantiated claims such as these constitute an abuse of the judicial process for which Rule 11 sanctions were designed.

Appellants appear to have relied entirely upon discovery in the hope of finding some factual support for many of their claims. In their Memorandum and Opposition to Defendants' Motion for a Protective ORder, appellants wrote:

> Plaintiffs anticipate that as a result of [deposing SBI defendant Bowman] they will be in a position to apply to the Court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure.

Appellants requested a temporary restraining order in their complaint. Rule 65(b) makes clear that a temporary restraining order may be granted only if

> it clearly appear from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

Rule 65(b) does not authorize counsel to request relief and then search through discovery for facts to support the relief already requested. The rule requires that "specific facts" be "shown" to the court with the request for relief. We agree with the district court that the appellants' request for relief and their indication that they were not "in a position to make the showing required by Rule 65(b)' without later discovery indicates an unacceptable level of pre-filing investigation.

We affirm the district court's findings that many of the allegations against state and local officials "have nothing to do with this case . . . and are factually unsubstantiated."

Allegations which suggest that the Sheriff is engaged in drug trafficking and that a black inmate died while in the Sheriff's custody are irrelevant. These allegations involve no injury to the plaintiffs, and the report of drug trafficking by the Sheriff's Office is wholly unsupported in fact. Appellants protest that these allegations were represented in the complaint only as beliefs of their clients, but this does not make them relevant to the complaint or less scandalous in nature. While irrelevant allegations, standing alone, may not be cause for Rule 11 sanctions, the existence of numerous irrelevant, unsubstantiated, and sensational allegations is an appropriate factor for a district court to consider in determining whether the pleading as a whole lacks adequate factual foundation.

In this case, the complaint was filled with irrelevant allegations not tied to specific injuries to plaintiffs, i.e., general allegations that Robeson County is beleaguered by poverty, illiteracy, and violence. There was little basis for the allegation that Britt, Townsend, Thornburg and Morgan conspired to appoint Townsend as District Attorney and to use SBI agents as political police to discredit the Republican candidate, and that allegation was again irrelevant. Hatcher and Jacobs had been indicted prior to Townsend's appointment, and none of the other candidates for District Attorney suggested that they would not continue the prosecution. Appellants' arguments as to the relevance of such allegations are tangential at best and often strain credulity.

Although Mr. Nakell and Mr. Pitts filed lengthy affidavits detailing their factual inquiry, such affidavits do not provide factual or legal support for the inaccuracies noted by the district court. The number of hours allegedly spent by counsel in pre-filing investigation does not dissuade us from affirming the district court's finding of Rule 11 violations. Given the adequate time to prepare and hours

allegedly spent in preparation of the complaint, appellants have presented no excuse for the many clear factual errors in this pleading.

Appellants have argued that, despite the lack of pre-filing foundation for their claims, it was appropriate to include the claims because support for them could only be obtained through discovery. In Kraemer v. Grant County, 892 F.2d 686 (7th Cir. 1990), the court held that sanctions were not warranted where an attorney relied on client information to support a cause of action based on a theory of conspiracy, even though additional facts were needed to prove the claim. "If discovery is necessary to establish a claim, then it is not unreasonable to file a complaint so as to obtain the right to conduct that discovery." 892 F.2d at 690. Despite this sweeping statement, there were in Kraemer a number of factors cautioning against sanctions which are not present here. In Kraemer, the attorney was a recent law school graduate, and had hired a private investigator to look into his client's allegations. The investigator's report did not discredit any part of the client's story and the prospective defendants refused to cooperate with the investigator. Only a single portion of the complaint - that dealing with the proof of state action - was ultimately found to be without support.

In the present case, appellants are experienced attorneys with both the time and the means to conduct a responsible factual investigation. The complaint contains myriad inaccuracies rather than a single error. Many of the factual inaccuracies could have been discovered by the most cursory investigation. The irrelevances are inexcusable considering the attorneys' experience. Indeed, it is remarkable that so many errors could have been undetected by appellants. The number of claims without factual foundation warrants sanctions, whether the errors stem from incompetency or wilful misconduct.

The need for discovery to complete the factual basis for alleged claims is not an excuse to allege claims with no factual basis. While we do not disagree with the result obtained in Kraemer, we find that it is not applicable to the present case. A lawyer is an officer of the court, and he should never file a lawsuit without confidence that it has a reasonable basis in fact and is well grounded in law. For the purposes of Rule 11, the factual inquiry necessary to file a complaint is generally satisfied if all of the information which can be obtained prior to suit supports the allegations made, even though further facts must be obtained through discovery to finally prove the claim. However, a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to sanctions.

C. Well Grounded In Law

The district court found that the complaint was not well grounded in law. We agree. Appellants contend that the strength of the legal basis of the complaint is demonstrated by their opponent's lengthy response to them, and the approval of a civil rights attorney, who reviewed and approved of, but did not sign, the complaint. The length of an opponent's response to a complaint does not validate the otherwise insubstantial claims therein, because a lengthy response may reveal less the merit of particular claims than the number of valid defenses to them. An opponent may have employed "scorched earth" tactics in composing a response far beyond what is required to oppose frivolous claims. Nor is the Rule 11 standard of whether a "reasonable attorney in like circumstances would believe his actions to be factually and legally justified" satisfied merely by having another attorney review a complaint. The reviewing attorney may be unfamiliar with the true facts of

the case, the factual and legal investigation conducted, or the law relevant to the complaint.

The district court enumerated several substantial claims without legal foundation. The court found no factual or legal basis for the double jeopardy claim to the state prosecution of Hatcher and Jacobs following the federal prosecution, because a subsequent prosecution by a different sovereign plainly does not constitute double jeopardy. See Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433 (1985). Although a "tool of the same authorities" exception is possible in some circumstances, see Bartkus v. Illinois, 359 U.S> 121 (1959), that exception may only be established by proof that State officials had little or no independent volition in their proceedings. See United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). In this case, however, the complaint alleged that the state officials instituted and controlled the state proceeding, which precludes the establishment of that exception. The district court also considered a quotation attributed to Mr. Pitts in a newspaper article that the state charges did not constitute double jeopardy. Although we caution the court against relying too heavily on press reports, we do not fault the district court for considering the statement.

The district court found without legal foundation the

Pitts has never denied making the statement. If an attorney states that a particular claim is groundless, then that statement is strong evidence for the imposition of Rule 11 sanctions. However, a statement reported in the press should never be the basis for sanctions; rather, to be a basis for sanctions, the statement should appear either in an affidavit, in other reliable testimony, or in a statement by counsel in court. In this case, the reported statement was that the state charges did not "technically" constitute double jeopardy.

plaintiffs' claim that Hatcher's Fifth Amendment rights were damaged when the state tried to extract testimony from Jacobs. Fifth Amendment protection is personal to the individual whose testimony is being compelled and appellants as experienced attorneys should have been well aware of this. Moran v. Burbine, 475 U.S. 412, 433 (1986). Appellants make no attempt to explain away this glaring blunder.

Appellants sought to enjoin state criminal proceedings, but the district court found that the Younger v. Harris abstention doctrine clearly barred such relief. See Younger v. Harris, 401 U.S. 37 (1971). The court also found that Hatcher and Jacobs could have presented their federal constitutional claims to the state court. We agree that plaintiffs had no factual basis for claiming that the state prosecution was brought in bad faith, or without a reasonable expectation of conviction, because Hatcher and Jacobs had never denied taking hostages. Although appellants cite an Eighth Circuit case which suggests that the Younger abstention doctrine does not apply if "a prosecution was brought in realization for or to discourage the exercise of constitutional rights. . . 'regardless of whether valid convictions conceivably could be obtained,'" Lewellen v. Raff, 843 F.2d 1103, 1109-10 (8th Cir. 1988), cert. denied, 109 S.Ct. 1171 (1989), that proposition has been rejected by this court. In Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986), we upheld the use of the Younger abstention doctrine when plaintiffs claimed that their prosecution under obscenity laws chilled their First Amendment rights.

The district court also noted "serious standing problems with many of the plaintiffs' claims." For example, on the claim that the prosecution chilled Hatcher and Jacobs' First Amendment expression, the complaint presented no facts showing specific harm or threat of harm, as required by Laird v. Tatum, 408 U.S. 1 (1972). Appellants respond that

they did show concrete and specific harm insofar as plaintiffs' participation in the petition drive was curtailed. However, Hatcher and Jacob's participation was not curtailed, and the district court's observation on their standing problem with respect to that claim is valid.

We therefore affirm the court's finding that the complaint on the whole was not well grounded in law.

D. Improper Purpose

Sanctions could have been imposed for the violations already discussed, but the district court also based the award of sanctions on appellants' improper purpose in filing the complaint. The type and number of Rule 11 violations are considered in determining the appropriate sanction, and it was proper for the district court to consider appellants' purpose. Although the district court first discussed "improper purpose" under Rule 11, whether or not a pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer's purpose, and we suggest that a district court should consider the first two prongs of Rule 11 before making a determination of improper purpose.

Appellants argue that the district court's conclusions as to their purpose are clearly erroneous, because there is no evidence in the record to support the court's findings, or the findings are based on factual conclusions which were contested by affidavit. The district court concluded that sanctions would be appropriate based on the improper purpose of the lawsuit "[e]ven if the complaint had a proper legal and factual basis." Since we have affirmed the court's findings that the complaint in the instant case was not well grounded in law or in fact, we need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was filed for an

improper purpose. Rather, we look only to whether the court abused its discretion in finding that the complaint was filed for an improper purpose. But see Cohen v. Virginia Elec. and Power Co., 788 F.2d 247 (4th Cir. 1986) (A finding of improper purpose was appropriate where plaintiff had a preconceived plan to withdraw a motion, which was otherwise legally and factually supportable, if the opposing party resisted).

Rule 11 defines the term "improper purpose" to include factors "such as to harass or to cause unnecessary delay or needless increase in the costs of litigation." The factors mentioned in the rule are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central sincere. Filing of excessive motions may sometimes constitute "harassment" under the rule even if the motions are well grounded. See Aetna Life Ins. Co. v. Alla Medical Serv., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988). Likewise, filing a motion or pleading without a sincere intent to pursue it will garner sanctions. See Cohen, supra.

We have previously stated that in order to determine "improper purpose," a district court must judge the conduct of counsel under an objective standard of reasonableness rather than assessing subjective intent. Stevens v. Lawyers mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986); Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988). This test was derived from Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986), where it was stated that "[h]arrassment under Rule 11

focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit. An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

There is some paradox involved in this analysis, because it is appropriate to consider the signer's subjective beliefs to determine the singer's purpose in filing suit, if such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility. Circumstantial facts surrounding the filing may also be considered as evidence of the signer's purpose. Repeated filings, the outrageous nature of the claims made, or a signer's experience in a particular area of law, under which baseless claims have been made, are all appropriate indicators of an improper purpose.

> The district court concluded that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs.

The court drew its conclusions without the aid of an evidentiary hearing, but relied upon the evidence before it. The court's first conclusion, that counsel never intended to litigate the action, is the one which most clearly supports sanctions based on a finding of improper purpose. The fact that so many allegations in the complaint lacked a basis in law or in fact strongly supports the court's finding of improper purpose. The existence of baseless allegations does not alone require a finding of improper purpose, because inexperience or incompetence may have caused their inclusion in a pleading, rather than or in addition to willfulness or deliberate choice. See Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). However, in this case counsel are clearly not inexperienced, and the number and magnitude of claims without foundation suggests that incompetence is not the cause for such allegations in the complaint. This court is left with the conclusion, drawn by the district court, that counsel wilfully included the baseless claims. If counsel wilfully files a baseless complaint, a court may properly infer that it was filed either for purposes of harassment, or some purpose other than to vindicate rights through the judicial process. We therefore affirm the district court's finding that appellants violated the improper purpose prong of Rule 11.

In addition to relying upon the complaint itself, the district court inferred an improper purpose from the timing of the filing of the complaint, on the eve of the anniversary of the takeover of The Robesonian, and some time after the alleged constitutional violations began. The court also viewed with suspicion the timing and nature of the dismissal of the complaint, which occurred after Jacobs lost his extradition fight in the criminal case, and before any significant discovery might have given notice to the plaintiffs that their claims were not valid. The district court dismissed as incredible appellants' explanations for dismissal, which

contended that many of the claims had become moot through a series of events. The district court found it "absurd" to think that the wide-spread conspiracy involving high-level state and public officials had suddenly become unimportant by May 2, 1989. The court noted that the basis of the complaint - the breach of the alleged no-prosecution agreement - still existed even after Hatcher's and Jacobs' guilty pleas to the state charges. The court stated that the double jeopardy claims, damage claims, and other requests for equitable relief, if ever valid, did not cease being valid. In finding improper purpose, the district court was also influenced by the outrageous nature of the claims made.

The affidavits submitted by counsel strongly disputed the court's conclusions as to the timing of the filing and of the dismissal of the suit, and claimed that no improper motive influenced the timing of events. As to the decision to dismiss, appellants argued that it was based solely on financial considerations and the necessity of devoting professional resources elsewhere. Appellants argue that many equitable claims had become moot, and that the prospect for damages on the remaining claims did not warrant the expense of continuing the suit. However, the district court's determination that these explanations are not reasonable or believable, in light of all of the evidence surrounding the filing of the complaint and the frivolousness nature of the allegations made, is not clearly erroneous.

The district court noted other evidence which suggested that appellants' purpose in filing the complaint was not to vindicate plaintiffs' rights, such as appellants sending a copy of the complaint to the state judge who likely would have tried Hatcher and Jacobs in the criminal case. The court also noted a quotation reported by the media, in which Mr. Pitts allegedly suggested that the suit was dropped after the Attorney General's office showed strong opposition to the suit. The court further considered an affidavit by New York

attorney Neal Rose concerning Mr. Pitts' alleged admission that the suit was commenced as leverage and lacked a factual basis, although that affidavit was contradicted by an affidavit by attorney Alan Rosenthal. In light of other evidence which supports the court's finding of improper purpose, we cannot say that it was an abuse of discretion for the court to consider these matter as additional support, even though determinations of credibility are best made after an evidentiary hearing.

In concluding that appellants had never intended to litigate their suit, the district court also concluded that circumstances surrounding the case, when viewed as a whole, supported the conclusion that appellants' primary motives in filing the complaint were to gain publicity, to embarrass state and county officials, to gain leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. At least some of these motives would not warrant sanctions under the improper purpose portion of Rule 11, if appellants' central purpose in bringing suit had been to vindicate rights of the plaintiffs. Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant, so long as there is evidence that a plaintiff's central purpose in filing a complaint was to vindicate rights through the judicial process. In this case, however, there was no proper purpose for appellants' filing of the suit, and the district court's consideration of other possible motives for the suit based ont he evidence available was proper.

We have affirmed the district court's conclusion that sanctions were warranted based on the improper purpose prong of Rule 11 because it is not clearly erroneous and is supported by facts such as the baseless allegations made,

appellants' legal experience, and the cumulative nature of the evidence. However, we urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purpose as well as failure to comply with the first two prongs of Rule 11. We do not find that the court erred in failing to hold an evidentiary hearing in this case, because the cumulative nature of the evidence, as well as our earlier findings on the frivolousness of the allegations made in the complaint and the lace of a legal or factual basis, convinces us that the court's finding of improper purpose is not clearly erroneous and would not have been altered by an evidentiary hearing.

IV
DUE PROCESS

Appellants argue that the district court should not have found a violation of the "improper purpose" prong of Rule 11 without holding an evidentiary hearing. We disagree. Due process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11. The Advisory Committee Note on Rule 11, 28 U.S.C. App., pp. 575-76, indicates that satellite litigation over sanctions and separate hearings should be limited to the extent possible. "[T]he court must to the extent possible limit the scope of the sanction proceedings to the record."

Appellants cite two Seventh Circuit cases which suggest that a hearing should be held where sanctions are based on a signer's "bad faith." See Brown v. Nat'l. Bd. of Medical

Examiners, 800 F.2d 168, 173 (7th Cir. 1986); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 206 (7th Cir. 1985). We are not persuaded by the scant reasoning of these cases that a hearing is required whenever improper purpose is found under Rule 11. Appellants also cite INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 9\391, 405 (6th Cir.), cert. denied, 108 S.Ct. 291 (1987). Although it cites Rodgers, Chem-Nuclear Systems does not support appellants' proposition. Instead, the court simply notes that

> no hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact, and where the judge imposing sanctions has participated in the proceedings. These are the circumstances in [this] case.

Id. Counsel was also sanctioned in that case for filing motions for an improper purpose.

In determining whether and to what extent a hearing is required prior to the imposition of sanctions, we are guided by the Advisory Committee Note to Rule 11 and the reasoning of Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987);

> The Advisory Committee Note indicates some of the matters to be considered: (1) the circumstances in general; (2) the type and severity of the sanction under consideration; and (3) the judge's participation in the proceedings, the judge's knowledge of the

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Brown cites only Rodgers for the proposition. Rodgers itself relies on Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 97th Cir. 1983), a case which is based not on the current Rule 11, which relies on an objective standard of reasonableness, but on a wholly subjective test.

facts, and whether there is need for further inquiry. The Advisory Committee Note observes that "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

When an attorney has failed to present necessary factual support for claims despite several opportunities to do so, for example, further hearing ont he sanctions of judicial resources. On the other hand, when a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater. Prior opportunities to respond to Rule 11 charges will also influence the extent to which further hearing is necessary.

As mentioned by the Advisory Committee, tho type and severity of the sanction are necessary elements in the calculus. The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due.

(Footnote omitted.)

Even if an evidentiary hearing is not required in every "improper purpose" case, appellants argue that such hearing was required in this case. Although the number of credibility determinations which the court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs

of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.

The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing. The district court had before it the pleadings, the summary judgement motions of the state defendants and the 12(b) motion of the county defendants. We also find that counsel were given an adequate opportunity to contest the court's determinations that Rule 11 was violated. The district court allowed appellants to submit affidavits, and voluminous written legal arguments. The district judge also heard oral argument. We find that due process requirements were satisfied by the opportunities appellants were given to respond to the charges that their complaint violated Rule 11.

However, although we find that counsel had an adequate opportunity to contest the court's finding that Rule 11 was violated, we find that appellants were not given an adequate opportunity to respond to the type and amount of sanction imposed, particularly in light of the large monetary sanction. Appellants were given no opportunity to contest the fee statements submitted, and the amount of the sanction was largely the result of those statements. Under the facts of this case, particularly the amount of the sanction, due process requires that appellants have some opportunity to contest the amount of the sanction imposed. We therefore vacate the sanction imposed. As discussed below, we vacate the type and amount of sanction chosen by the district court for certain additional reasons. On remand, under the guidelines set forth below the appellants will be given an appropriate opportunity to respond to the type and the amount of the sanction.

V
AMOUNT OF SANCTION

A. Attorney Fees Portion

Rule 11 requires that "an appropriate sanction" be imposed upon those who violate its requirements. Appellants argue that the amount of sanctions was inappropriate, in part because the district court used the Rule to shift fees and compensate the defendants, rather than to deter improper litigation. We agree and vacate the amount of the monetary sanction.

We have previously held that the least severe sanction adequate to serve the purposes of Rule 11 should be imposed. Cabell v. Petty, 810 F.2d 463, 466 (1987). It is clear that Rule 11 should not blindly be sued to shift fees. In this instance, it appears that the district court erred in assuming that "[t]he first purpose of sanctions under Rule 11 is to compensate the offended parties." In establishing the amount of the sanction, the district court improperly focused on providing "compensatory sanctions." The amount of expense borne by opposing counsel in combatting frivolous claims may well be an appropriate factor for a district court to consider in determining whether a monetary sanction should issue and if so, in what amount. However, it is clear that the primary, or "first" purpose of Rule 11 is to deter future litigation abuse. A district court can and should bear in mind that other purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets and facilitating court management. White v. General Motors Corp., ___ F.2d ___, 1990 WL 99472 (10th Cir. 1990); Hartmarx Corp., 118 S. Ct. at 2454-57. But the amount of a monetary sanction should always reflect the primary purpose of deterrence.

When a monetary award is issued, a district court should explain the basis for the sanction so a reviewing court may have a basis to determine whether the chosen sanction is appropriate. A district court should consider the four factors recently enumerated by the Tenth Circuit in White v. General Motors Corp., ___ F.2d ___: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation.

> 1) Reasonableness (lodestar) calculation. Because the sanction is generally to pay the opposing party's "reasonable expenses . . . including a reasonable attorney's fee," Fed.R.Civ.P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. The injured party has a duty to mitigate costs by not overstaffing overresearching or overdiscovering clearly meritless claims. In evaluating the reasonableness of the fee request, the district court should consider that the very frivolousness of the claim is what justifies the sanctions.

____F.2d at ____ (citations omitted).

Attorney time which is attributed to responding to the media, or to claims within a pleading which do not merit sanctions, should be excluded from consideration. Only attorney time which is in response to that which has been sanctioned should be evaluated. In this case, it is appropriate for the court to consider on remand whether the large amount of time devoted to the pursuit of sanctions was warranted, and whether the injured parties failed to mitigate their costs by delaying their pursuit of sanctions

until after the dismissal. It would also be appropriate for the district court to reduce the amount of any fees awarded based on appellees' failure to give earlier notice to appellants that their conduct warranted Rule 11 sanctions. See Advisory Committee Note. While the analysis of the reasonableness of costs may call for fairly detailed affidavits, this requirement is not intended to require evidentiary hearings.

Although amici curiae for appellants argue that sanctions based in whole or in part on attorney's fees require the same procedures of discovery, briefing, and argument allowed in attorney's fees cases, we have already stated that sanctions, unlike attorneys fees, are not primarily intended to compensate the prevailing party. Because the purposes of sanctions differ from those of attorney's fees, the amount of process due the offending party differs.

The determination of the type or amount of the sanction imposed comes only after the offending party has had an opportunity to defend against the imposition of any sanction.[4] Presumably, a party's interest in the kind and amount of a sanction is of less import than his or her interest in the decision to impose any sanction. As stated, a district court is required to choose the least severe sanction adequate to accomplish the purpose of Rule 11. Thus, a monetary sanction should never be based solely on the amount of attorney's fees in the context of Rule 11 "does not necessarily mean actual expenses and attorney's fee." Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 211 (4th Cir. 1988). Because the amount of a monetary sanction is

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[4]Appellants have already had this opportunity, and on the present record we are convinced that Rule 11 sanctions against the three appellants are not only proper, but they are required if the Rule is to have any meaning.

not based solely on any claimed amount of attorney's fees but rather on all of the factors listed herein, the risk of an erroneous calculation based on fee statements is less troublesome in the context of a Rule 11 sanction than in attorney's fees cases. We also bear in mind the interest in avoiding additional hearings for purposes of calculating the amount of fees in the context of Rule 11. See Advisory Committee Note. Given these considerations, we hold that a sanctioned party is not entitled to an evidentiary hearing or to all of the procedural safeguards available in the context of attorney's fees actions. Instead, a district court may permit a sanctioned party to respond to an opposing party's fee statements in its discretion. Of course, such discretion must be exercised with proper considerations of due process. Where a court determines that a large monetary sanction should discus, and the amount is heavily influenced by an injured party's fee statements, as was the case here, the court should permit the sanctioned party to examine and contest the injured party's fee statements as an aid to the court's own independent analysis of the reasonableness of the claimed fee.

> 2) Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. . . . [T]he amount of sanctions is appropriate only when it is the 'minimum that will serve to adequately deter the undesirable behavior.' . . . Thus, the limit of any sanction award should be that amount reasonably necessary to deter the

wrongdoer.

White, ___F.2d at ___ (citations omitted).

A district court must constantly bear in mind the limited purposes of Rule 11, particularly in a case such as this, where a court may disagree with aspects of counsel's conduct which fall outside of the scope of Rule 11. Of course, a court must also constantly bear in mind that the rule is not to chill the bringing of facially valid lawsuits, or a lawyer's creativity in introducing novel theories of recovery.

> 3. Ability to pay. The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages. . . . Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

White, ___ F.2d at ___ (citations omitted).

Although the burden is upon the parties being sanctioned to come forward with evidence of their financial status, a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion. A court should refrain from imposing a monetary award so great that it will bankrupt the offending

parties or force them from the future practice of law. Generally, the smaller the amount of the monetary sanction imposed, the greater the likelihood that a court's consideration of the ability to pay will not want for lack of the formal submission of evidence on a sanctioned party's financial status. When the monetary sanction is large, however, the parties should generally be given the opportunity to submit affidavits on their financial status, or to submit such other evidence as the court's discretion permits. In this case, the amount of the monetary sanction originally imposed was substantial, and the parties should have been afforded the opportunity to submit evidence ont he issue of whether the amount imposed was so great as to unfairly restrict their access to the courts or to otherwise curtail their ability to practice law or to cause them great financial distress.

> 4. Other factors. In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See [American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, 212, 236-37 (Supp. 1989)].

In this case, it is appropriate for the court to consider counsel's vast experience, the outrageous and scandalous nature of the claims made, and the improper purpose of the lawsuit. A court might also increase a sanction if one attorney has been previously sanctioned, because such conduct might indicate that the previous sanction was not enough to deter the repetition of the offense.

In addition to the four factors just stated, a district court must sometimes consider whether joint and several liability is appropriate, such as where sanctions are to be imposed against both a client an his counsel. In this case, joint and several liability among attorneys, who each signed a complaint in violation of Rule 11, was not inappropriate. Under Pavelic & LeFlore v. Marvel Entertainment Group, each attorney has a duty to ensure that the pleading he has signed comports with Rule 11. Issues of individual culpability do not arise where each sanctioned party has committed the same Rule 11 violations.

B. Additional Sanctions

In addition to imposing sanctions in the amount of attorney's fees claimed by the defendants, the district court imposed sanctions in the amount of $10,000 upon each appellant based on his conduct in wilfully filing outrageous claims and appellants' "pains to publicize the allegations through the media." We believe this sanction was error. Rule 11 does not confine courts to any maximum monetary sanction, nor does it even require courts to restrict themselves to monetary penalties. However, Rule 11 must be accorded its plain meaning. The text of the Rule clearly pertains only to a "pleading, motion, or other paper." Rule 11 does not encompass all conduct within judicial proceedings, and it clearly does not reach conduct outside of the judicial process. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987). In this case, it appears the court imposed sanctions in part based on appellants' publication of their baseless claims through the media. While such publication may not be actionable as libel or slander, and is reprehensible, Rule 11 was clearly not designed to encompass such conduct.

VI

Appellants' argument that the district court should have granted their own motion for sanctions against appellees is without merit. The denial was not an abuse of discretion.

VII
CONCLUSION

In sum, we affirm the findings of the district court which led to the imposition of Rule 11 sanctions in this case against plaintiffs' attorneys. However, we vacate the sanction imposed, because it was based on improper considerations and the size of the sanction required the district court to allow sanctioned counsel an opportunity to respond, at least to the fee statements on which the sanction was based. On remand, the district court should consider the factors which we have adopted prior to determining the sanction which should be imposed.

AFFIRMED IN PART, VACATED IN PART,

AND REMANDED WITH INSTRUCTIONS

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 89-06-CIV-3-H

ROBESON DEFENSE COMMITTEE, et al., CARNELL LOCKLEAR, MARY SANDERSON, THELMA CLARK, ELEANOR JACOBS, BETTY McKELLAR, EDDIE HATCHER, and TIMOTHY JACOBS,	)	
Plaintiffs,	)	ORDER
v.	)	
JOE FREEMAN BRITT, RICHARD TOWNSEND, LEE EDWARD SAMPSON, HUBERT STONE, LACY H. THORNBURG, ROBERT MORGAN, JAMES BOWMAN, JAMES G. MARTIN, SBI DOE I, SBI DOE II, SBI DOE III, DEPUTY SHERIFF DOE I, DEPUTY SHERIFF DOE II, DEPUTY SHERIFF DOE III, DEPUTY SHERIFF DOE IV, DEPUTY SHERIFF DOE V, DISTRICT ATTORNEY DOE I, DISTRICT ATTORNEY DOE II, DISTRICT ATTORNEY DOE III, ROBESON COUNTY, et al.,	)	
Defendants.	)	

This matter is before the court on the parties' cross-motions for sanctions pursuant to Fed. R. Civ. P. 11. Plaintiffs filed this civil rights action under 42 U.S.C. § 1983, alleging a deprivation of constitutional rights. Plaintiffs include the

Robeson Defense Committee, an unincorporated association, several Native-American and African-American residents of Robeson County, Eddie Hatcher, and Timothy Jacobs. Defendants include Governor Jim Martin, former District Attorney Joe Freeman Britt, District Attorney Richard Townsend, Attorney General Lacy Thornburg, Director of the State Bureau of Investigation Robert Morgan, state employee Lee Edward Sampson, and various John Doe State Bureau of Investigation agents and assistant district attorneys.

STATEMENT OF FACTS

This civil rights action arose out of the criminal proceedings that followed the armed takeover of the Robesonian newspaper by plaintiffs Hatcher and Jacobs. Hatcher and Jacobs were acquitted by a federal jury on federal charges stemming from the takeover. Their defense was that the takeover was necessary to gain protection and to have a forum to express their views that the local sheriff and district attorney offices were corrupt.

Hatcher and Jacobs were subsequently indicted by the State on State charges arising out of the Robesonian takeover. This State prosecution and the circumstances surrounding it allegedly formed the basis for plaintiffs § 1983 complaint. Plaintiffs asked for damages and an injunction of the STate criminal proceedings.

Plaintiffs filed the complaint on January 31, 1989 over the signature of Barry Nakell and filed an amended complaint on March 16, 1989 over the signature of Nakell, William Kunstler, and Lewis Pitts. Plaintiffs alleged, among other things, that Governor Martin, through his agents, negotiated an agreement with Hatcher and Jacobs that they would not be prosecuted by Robeson County law enforcement authorities. Plaintiffs allege that Governor Martin agreed with defendants Britt, Thornburg

and the U.S. Attorney's Office that Hatcher and Jacobs would be prosecuted by federal, not state, authorities. It is alleged that the State prosecution violates this agreement.

The complaint alleges that following the federal acquittal, the plaintiffs engaged in First Amendment activity in Robeson County in an effort to encourage political change. Plaintiffs allege that various defendants conspired to harass and intimidate plaintiffs to prevent them from engaging in these First Amendment activities.

Plaintiffs allege that various defendants interfered with Jacobs' Sixth Amendment rights by advising his family and friends that Jacobs should fire his New York counsel and retain local counsel and that Jacobs should voluntarily return to North Carolina to testify against Hatcher. Plaintiffs allege that these communications interfered with Jacobs' relationship with his counsel and his joint defense with Hatcher. Plaintiffs also allege that defendants attempted to coerce Jacobs into testifying in violation of Hatcher's Fifth Amendment rights. Plaintiffs assert finally that the subsequent State prosecution violated the Double Jeopardy Clause.

After defendants answered and filed a motion to dismiss, plaintiffs requested a voluntary dismissal with prejudice under Fed. R. Civ. P. 41(a)(2), which this court granted on May 2 1989. Defendants subsequently moved for Rule 11 sanctions based on the complaint and amended complaint; plaintiffs moved for Rule 11 sanctions based on defendants' Rule 11 motion. Plaintiffs also asked for discovery and an evidentiary hearing. The court, having been inundated with written materials[1] and having heard oral arguments, is now prepared

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[1]On the Rule 11 motion alone, the defendants have written 97 pages of memoranda, the plaintiffs 90. Each side has submitted several hundred pages of appendices. The previous filings in the

to rule on these motions and requests.

RULE 11

Rule 11 of the Federal Rules of Civil Procedure states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of this rule, the court, ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 has three prongs, the violation of any one of which justifies sanctions. First, any pleading signed by an attorney must not be interposed for any improper purpose. See NCNB Nat. Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987). Second, a pleading must be warranted by existing law or a good faith argument for modification of existing law or a good faith argument for modification of

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case are of similar length.

existing law. See Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987). Third, Rule 11 requires an attorney to make reasonable inquiry to determine that the pleading is well grounded in fact. See Fahrenz v. Meadow Farm Partnership, 850 F.2d 207 94th Cir. 1988). The court discusses in greater detail the development and purposes of Rule 11 in Barnett D. Plotkin, et al. v. Association of Eye Care Centers, Inc., et al., No. 88-87-CIV-5-H (E.D.N.C. September ___, 1989), in which this court today has denied a request for sanctions. Therefore, the court will not again address the development and purpose of Rule 11 in this order.

As a preliminary matter, plaintiffs argue that the dismissal of this action pursuant to Rule 41(a)(2) precludes the defendants from bringing the present Rule 11 motion. Plaintiffs argue that defendants did not reserve the right to file such a motion and that the court's dismissal contained no such reservation. This argument is without merit.

Nothing in the Rule states that a party loses the right to Rule 11 sanctions if he fails to reserve such a right as a condition to a Rule 41(a)(2) dismissal. The terms and conditions that may be imposed upon a voluntary dismissal are for the protection of the defendant. Wright & Miller, Federal Practice and Procedure: Civil § 2366 (1971 and Supp. 1988). A voluntary dismissal without prejudice allows a plaintiff to bring a later identical action. Therefore, it is the defendant's interests which are protected by conditions imposed in a Rule 41(a)(2) dismissal. LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603 (5th Cir. 1976).

In this case, the court dismissed the plaintiffs' suit with prejudice. Such a dismissal constitutes a final judgment and bars the plaintiffs from bringing a second suit on the same cause of action. The need to protect the defendants' interest due to the possibility of a second suit is not present in this case. Nothing in Rule 41(a)(2) bars this Rule 11 motion.

Harris v. Marsh, 123 F.R.D. 204, 228-29 (E.D.N.C. 1988), citing Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1076-79 (7th Cir. 1987), cert. dismissed, ___ U.S. ___, 108 S.Ct. 1011, 99 L.Ed.2d 229 (1988).[2]

PLAINTIFFS BROUGHT THIS CIVIL ACTION FOR AN IMPROPER PURPOSE

The court addresses this prong first because it is greatly concerned with the motives of plaintiffs' attorneys and the manner in which they have conducted themselves. The activities of plaintiffs and their counsel, as well as the papers filed with the court, indicate that plaintiffs' attorneys initiated the § 1983 action not to vindicate constitutional rights, but more probably to gain publicity and to influence the State prosecution then underway against Hatcher and Jacobs.[3]

This action was filed on January 31, 1989, which is significant in that it was the day before the one-year anniversary of the Robesonian takeover. Moreover, counsel did not merely file the complaint, but followed it with a press conference on the Robeson County Courthouse steps. The voluntary dismissal was conducted with considerably less

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[2]Plaintiffs next argue that the defendants' Rule 11 motion is not timely in that it was filed two months after the dismissal. This argument is without merit. Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165 (4th Cir. 1987) (in absence of local rule, the only time limitation arises out of equitable considerations that a district judge may weigh in his discretion).

[3]Plaintiffs' counsel asserts that asking for an injunction is a proper way to "interfere" with a pending state prosecution. The court agrees; however, the court finds improper purpose from conduct other than the mere filing of a request for injunctive relief.

fanfare.[4]

Plaintiffs assert that they filed the civil rights actio in response to harassment and intimidation directed towards them from October 14, 1988 to January 31, 1989. The complaint sought injunctive relief ordering termination of the harassment, termination of the prosecution, and termination of the State's communication with Jacobs and his family concerning his legal representation. However, plaintiffs waited through October, November, December, and January to file this complaint. This timing indicates that the motivation behind the complaint was not the vindication of constitutional rights. Mr. Pitts stated to the press after the dismissal:

> The relief we could have won would be, I think, very limited compared to the amount of resources that would have had to be plowed into it .... And we think there would be better ways of raising the issues of injustice and drug trafficking and deliberate indifference by public officials than by the suit.

Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article).

The question arises as to why plaintiffs' filed this suit. First, plaintiffs faced Jacobs' extradition hearings in New York the following month. The court finds that the civil action was instituted as leverage in these extradition proceedings. Neal

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[4]The court is aware that conducting a press conference is a First Amendment activity. The court is not imposing sanctions because of htis press conference. The court does not mean to indicate that it will impose Rule 11 sanctions on attorneys who speak to the press. However, the court believes that the press conference and what was said therein, considered in light of the surrounding circumstances, is evidence of improper purpose.

P. Rose, a New York District Attorney, has filed an affidavit with the court stating that Mr. Pitts offered to dismiss this civil action as part of the plea bargain and that Mr. Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact. Defendants' Memorandum, Exhibit 2. In response, Mr. Pitts contends that he was concerned only with the negative consequences of the civil rights action as it related to the pending criminal prosecutions. Plaintiffs' Memorandum at 40. This contention is difficult to accept in light of the intentional publicity that plaintiffs gave this case. It would appear that had Mr. Pitts truly been concerned with the negative consequences of the § 1983 case, he would not have intentionally tweaked the state's nose in a press conference.

Second, the day the complaint was filed, Mr. Nakell wrote a letter to State Court Judge Anthony M. Brannon, who likely would have been the judge to try Hatcher and Jacobs, and enclosed a copy of the federal civil complaint. Defendants' Memorandum in Support of Motion for a Protective Order, Exhibit D. This somewhat astonishing conduct indicates that the motive behind the filing of the civil rights action was to influence Judge Brannon and other state and county officials.

Third, plaintiffs filed this action to obtain discovery otherwise unobtainable under North Carolina Criminal Procedure. By naming Bowman and Britt as defendants, plaintiffs could obtain discovery of the State's criminal investigatory files otherwise unavailable to them under North Carolina procedure. Shortly after filing the complaint, plaintiffs sought leave of court to depose Bowman, even though they had not yet served all of the defendants. Plaintiffs sought expedited discovery, not because it was necessary to pursue the civil action, but because normal discovery would not have helped them in Jacobs' upcoming extradition hearing in New York. Furthermore, at the press conference announcing the filing of the suit, Mr. Pitts stated

that "now we have the subpoena power ...," indicating that the action was filed to gain access to State Bureau of Investigation files, rather than to vindicate constitutional rights. After the extradition hearing, the suit was dropped.[5]

The most damning evidence of all, however, is the sudden and inexplicable voluntary dismissal with prejudice on May 2, 1989. Significantly, this dismissal occurred after Jacobs lost his extradition fight and returned to North Carolina and before any significant discovery or other event which would have given notice to the plaintiffs that their claims were not valid. Indeed, with Jacobs now back in North Carolina, he would have once again been subject to the unconstitutional conduct of the various defendants.

Plaintiffs state as a reason for the dismissal that the Sixth Amendment issues had become moot since Jacobs had received an acceptable plea bargain, and that the First Amendment objections were no longer important because the interference had stopped. Neither reason is credible if the true intent of plaintiffs was to vindicate constitutional rights. Plaintiffs alleged widespread First Amendment violations impacting on a number of persons. The mere fact that the conduct stopped does not moot those claims. Nor is it clear that Jacobs' Sixth Amendment claims are moot just because he retained other counsel. United States v. Smith, 653 F.2d 126 (4th Cir. 1981); Powell v. Alabama, 287 u.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) (constitutional right to counsel includes right to counsel of one's choice). Jacobs still had a claim that the defendants intentionally interfered with his counsel of choice, and Hatcher

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[5]Furthermore, in plaintiffs' cross-motion for sanctions they again ask for discovery. They have failed to show why discovery would be necessary to litigate these Rule 11 motions. Discovery would, however, be helpful to the criminal defense of Mr. Hatcher who now faces 14 charges of second degree kidnapping.

and Jacobs still had a claim that their joint defense had been impaired.

Plaintiffs have alleged a widespread conspiracy involving high-level state and county officials. It is absurd to think that these allegations were suddenly unimportant by May 2, 1989. Furthermore, the basis of the complaint is that the State promised Hatcher and Jacobs that it would not prosecute them. If this were true, the alleged breach of this agreement still exists as to Hatcher and even as to Jacobs following his guilty plea.

Plaintiffs alleged that the prosecution of Hatcher and Jacobs was barred by the Double Jeopardy Clause. Those claims, if they were valid to begin with, were every bit as valid when plaintiffs dismissed the case. None of the damage claims and few of the requests for equitable relief were affected by any event occurring between the date of filing and the date of dismissal. Hatcher and Jacobs remained subject to the same purportedly unconstitutional prosecutions, and counsel's assertion that the alleged oppression of civil liberties in Robeson County had suddenly ceased is not credible.

Defendants contend that a financial decision was made that the damage claims did not warrant the extensive expenditure of time and professional resources. Such a decision should have been made before suit was filed. After the dismissal, Mr. Pitts was quoted as saying that the case was dismissed after the Attorney General's Office "made it very clear that ... everything was going to be arm's length warfare." Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article). The court concludes that plaintiffs brought the suit for publicity purposes and dropped it when major opposition resulted. This in itself violates Rule 11.

Counsel contended at the hearing that the suit was dismissed because the State had successfully split Hatcher and

Jacobs. However, this fact makes none of their claims less cognizable, and, more importantly, there is evidence that Hatcher and Jacobs had parted ways before even the original complaint was filed. Plaintiffs' Memorandum, Exhibit 56.

This court is forced to conclude that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. All of these purposes are improper and warrant sanctions under Rule 11. Even if the complaint had a proper legal and factual basis, sanctions would be appropriate since this court finds that the purpose of the lawsuit was improper. See e.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987).

COUNSEL FAILED TO MAKE A REASONABLE INQUIRY TO DETERMINE IF THE COMPLAINT WAS WELL GROUNDED IN FACT AND WARRANTED BY EXISTING L

Plaintiffs filed a 35 page complaint and a 30 page amended complaint, much of which consisted of editorialization and a history lesson which even included a discussion of the use of segregated restrooms and water fountains in Robeson County since the time of Reconstruction. A complaint in federal court is supposed to be a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint is neither short nor plain and much of it, if not all of it, fails to show that any plaintiff is entitled to any relief. The complaint is riddled with claims that justify Rule 11 sanctions.

First, plaintiffs argue that the subsequent prosecution violates the Double Jeopardy Clause. First year law students learn that the Double Jeopardy Clause does not prohibit

subsequent prosecutions by different sovereigns. This concept was reaffirmed by the United States Supreme Court just four years ago in Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Heath is the latest in an unbroken chain of decisions ranging back at least as far as United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed 314 (1922). If plaintiffs' contention qualifies as a good faith argument for reversal of existing law, then precedent means nothing, and we will have to relitigate forever settled concepts of law. Plaintiffs also contend that the "tool of the same authorities" exception justifies their double jeopardy claim. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). This exception, however, does not bar cooperation between sovereigns; plaintiffs must establish that State officials had little or no independent volition in the State proceedings. United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). Plaintiffs allege, however, that the State officials instituted and controlled the subsequent proceedings; therefore, plaintiffs knew they had no basis for making a double jeopardy allegation.[6] Mr. Pitts even admitted to the press after filing the complaint that no double jeopardy problem existed. Pattishal, Justice in Robeson County: Carroboro Lawyers, Southern Racism, Bizarre Politics, and Death in the Cocaine Wilds, Robeson County Leader, April 13, 1989.

Second, plaintiffs contend that Hatcher's Fifth Amendment rights were harmed when the state tried to extract incriminating testimony from Jacobs. Amended Complaint, Par. 51. Fifth Amendment protection is personal to the individual whose testimony is being compelled. Moran v. Burbine, 475 U.S. 412 ,433, 106 S.Ct. 1135, 114, 89 L.Ed.2d 410, 438 (1986). Any testimony from Jacobs concerning Hatcher does not

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[6]Plaintiffs even alleged that the prosecution violated the state Double Jeopardy Clause, which cannot be asserted in a § 1983 action.

implicate Hatcher's right against self-incrimination. This claim has no basis in the law.

Third, plaintiffs requested an injunction of the State criminal proceedings, which is clearly barred by federal abstention doctrine. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Hatcher and Jacobs had ample opportunity to present their federal constitutional claims regarding the validity of the prosecution to the state courts. Judice v. Vail, 430 U.S. 327, 337, 97 S.Ct. 1211, 51 L.Ed.2d 376, 385 (1977). Plaintiffs had no basis for asserting that the state prosecution was brought in bad faith. Int he context of Younger abstention, bad faith generally means without a reasonable expectation of conviction. Suggs v. Brannon, 4\804 F.2d 274, 378 (4th Cir. 1986). Hatcher and Jacobs have never denied taking hostages, so there is simply no basis for believing that the State did not have a reasonable expectation of conviction. Plaintiffs have presented this court with no cases applying a Younger exception which even remotely resembles this case; their allegations of bad faith in affidavits submitted to the court are nothing but speculation. Furthermore, plaintiffs have failed to present one fact indicating that the prosecution was initiated to harass the plaintiffs.

Fourth, there are serious standing problems with many of the plaintiffs' claims. The complaint alleges that the prosecution of Hatcher and Jacobs has chilled their First Amendment expression. However, the Supreme Court has held that allegations of mere chill without any objective harm is not grounds for equitable relief. Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). Plaintiffs have not presented any fact showing a specific, present objective harm or a threat of specific future harm.

Fifth, plaintiffs misstate numerous facts in an effort to implicate the defendants in a massive and sinister conspiracy.

Plaintiffs assert that the district attorney "serves as the criminal prosecution arm of defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Robeson County ...." Amended Complaint, Par. 9-10. A simple reading of N.C.G.S. 7A-61, et seq. indicates that the district attorney is an officer of the STate and neither an agent nor an employee of Robeson County. Plaintiffs further allege that defendants Britt, Townsend and Sampson serve as agents or employees of Robeson County. These individuals are State officers and do not work for Robeson County. Plaintiffs also allege that District Attorney Britt refused and failed to discipline, train and supervise Sheriff's deputies. Amended Complaint, Par. 18. North Carolina District Attorneys possess no such power or responsibility.

Plaintiffs' counsel have previously misstated the duties and responsibilities of public officials named in a suit to implicate them in a conspiracy. Mr. Pitts, in Waller v. Butkovich, 584 F.Supp. 909, 935 n.5 (M.D.N.C. 1984), was cited for making misrepresentations concerning state law enforcement personnel. It would appear that a similar tactic has been employed in this present matter.

Sixth, one of the major allegations in the complaint is that the Governor, the Attorney General, and the District Attorney entered into an agreement that Hatcher and Jacobs would be prosecuted in federal and not state court. However, an examination of the North Carolina General Statutes reveals that neither the Governor nor the Attorney General possesses the power to bind the State not to prosecute.

As early as February 26, 1988, plaintiffs' counsel had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement between Hatcher and Kirk, or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not face North Carolina charges, and none

of the negotiators had the authority to so agree.

Seventh, plaintiffs have acknowledged to the court that when they filed the complaint asking for a temporary restraining order they did not possess facts sufficient to establish the necessity of such an order. In Plaintiffs' Memorandum and Opposition to Defendants' Motion for a Protective ORder, plaintiffs wrote:

> Plaintiffs anticipate that as a result of [deposing defendant Bowman] they will be in a position to apply to this court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action.

It is not a standard course of action to file a complaint and then conduct discovery in the "anticipation" that the complaint will prove warranted. In fact, such a course of conduct merits Rule 11 sanctions.

Finally, the complaint is filled with serious allegations of malfeasance of duty and criminal conduct on the part of high ranking state and local officials. Many of these allegations have nothing to do with this case or these plaintiffs and many are factually unsubstantiated.

For example, plaintiffs allege that a black inmate recently died while in Sheriff Stone's custody. Amended Complaint, Par. 27. The inmate's estate and family are not parties to this action and none of the plaintiffs were damaged by the inmate's death. Plaintiffs also allege that Sheriff Stone is engaged in illegal drug trafficking, but allege no injury special to them and have failed to produce one hard fact to justify this allegation.

Plaintiffs allege that blacks and Indians in Robeson County

have been subject to abusive behavior, but none of these plaintiffs allege that they have been assaulted or injured. Amended Complaint, Par. 15. Plaintiffs allege that Robeson County is beleaguered by poverty, illiteracy, and violence, none of which has anything to do with these plaintiffs stating a claim against these defendants. Amended Complaint, Par. 26.

Plaintiffs allege that Britt, Townsend, Thornburg and Morgan conspired to orchestrate the appointment of Townsend as District Attorney and to use State Bureau of Investigation agents as political police to discredit the only Republican candidate. Amended Complaint, Par. 44. Firs, counsel has failed to demonstrate that they had any factual basis for this allegation. Second, it has nothing to do with this case; the Republican candidate is not a party and none of the plaintiffs allege any injury from this incident.

All of this gratuitous commentary on the life and times in Robeson County, even if true, doe snot support any of the claims of relief; this court can conclude only that counsel included them for publicity and to intimidate the defendants and other involved in the Hatcher and Jacobs prosecution.

Counsel has submitted a stack of affidavits and exhibits purporting to explain why they believed they had a factual basis for filing the suit. The court has reviewed this material and is not impressed. Most of the affidavits, particularly those of counsel, are self-serving and largely based on hearsay and speculation. Counsel may subjectively believe these allegations to be true (and some of them may even be true), but Rule 11 applies an objective test. Counsel simply did not have a factual basis which would lead a reasonable attorney to believe that this civil action was justified.

In summary, the court finds that the entire complaint is tainted by improper purpose, and that counsel failed to

conduct a reasonable inquiry into the factual and legal allegations they were making.[7] Sanctions are imposed not merely because the legal and factual assertions in the complaint were erroneous; they are imposed because counsel would have discovered they were erroneous upon minimal research and investigation. A reasonable attorney would not have believed that this complaint was well grounded in fact or warranted by existing law.

PLAINTIFFS' CROSS-MOTION FOR RULE 11 SANCTIONS

As noted above, plaintiffs' counsel has filed a Rule 11 motion in response to defendants' Rule 11 motion, in which plaintiffs' counsel ask for discovery and an evidentiary hearing. Discovery is not permitted on Rule 11 motions absent extraordinary circumstances. See Adv. Com. Note to Fed. R. Civ. P. 11. No extraordinary circumstances exist int his case justifying discovery or an evidentiary hearing. For the reasons stated previously in this order, defendants' Rule 11 motion was properly filed, and the Rule 11 motion of plaintiffs' counsel must be and is hereby denied.

SANCTIONS ON PLAINTIFFS' COUNSEL

Needless to say, the imposition of sanctions under Rule 11 is not done lightly, or without great reflection on the part of

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[7]Mr. Kunstler states in an affidavit to the court that he ha dno personal knowledge of facts justifying the complaint and that he relied exclusively on Mr. Nakell. Plaintiff's Memorandum, Exhibit 3. In light of the serious allegations in the compalint, Mr. Kunstler's total reliance on other counsel is itself a violation fo Rule 11. Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987).

the court. With this in mind, the court notes that throughout the history of this country, there have been numerous attorneys specializing the area of civil rights. These attorneys have played an invaluable role in instigating and promoting numerous societal goals, many of which we now take for granted. Certainly the respondent Mr. Kunstler has been a leading civil rights attorney for many years. Nonetheless, Rule 11 applies to all attorneys, civil rights lawyers are not excepted. Oliver v. Thompson, 803 F.2d 1265, 1280-81 92d Cir. 1986), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). The court is certain that today's ruling in no way will deter civil rights lawyers from filing legitimate complaint sin the future to protect the civil rights of others and the Constitution that we all hold so dear.

This court has ruled on one issue and one issue only: the pending Rule 11 motions. The parties have attempted to lead this court into a broader inquiry into alleged corruption in Robeson County in general, and in Robeson County and North Carolina law enforcement in particular. Whether these allegations are true or false is not the issue currently before the court. The sole issue is whether the plaintiffs' counsel conducted a reasonable inquiry to determine if the complaint filed on January 31, 1989 and the subsequent amended complaint were well grounded in fact and law and were not filed for an improper purpose. Even if it were later determined that the allegations raised in those complaints were true, this court finds that the conduct of plaintiffs' counsel at the time of the filing of the original and the amended complaint is nonetheless sanctionable.

Having ruled that plaintiffs' counsel have violated Rule 11, sanctions are mandatory. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). The first purpose of sanctions under Rule 11 is to compensate the offended parties for all reasonable expenses incurred by reason of the Rule 11 violation. Accordingly this court hereby imposes liability on William M.

Kunstler, Barry Nakell, and Lewis Pitts, jointly and severely, in the amount of NINETY-TWO THOUSAND EIGHT HUNDRED THIRTY-FOUR DOLLARS AND TWENTY-EIGHT CENTS ($92,834.28), representing legal fees and expenses incurred by the State defendants represented by the Office of the Attorney General of North Carolina in the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613.58) and Robeson County defendants represented by Steven C. Lawrence of the law firm of Anderson, Broadfoot, Johnson & Pittman in the total amount of NINE THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTY CENTS ($9,220.70). This court has reviewed the affidavits filed by the attorneys of the North Carolina Attorney General's Office and finds the computation and final statement of costs and expenses incurred by the State in the defense of this matter to be reasonable and accurate, and also finds the affidavit of Steven Lawrence, Esquire, on behalf of the County defendants to be reasonable and accurate. Accordingly, this court has based its compensatory sanctions on these certified costs and expenses. The court further orders that these amounts be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina with interest at the rate of 8.19% per annum from the date of the filing of this order. When these sums are received by the Clerk of this court, he shall in turn remit to the State of North Carolina the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613,58) plus accrued interest and shall remit to Robeson County the amount of NINE H\THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTH CENTS ($9,220.70) plus accrued interest.

Compensation to the offended parties is not the only purpose for sanctions under Rule 11, however. In addition, the court may award sanctions to serve as a deterrence to others and as punishment to the particular attorneys involved. The court hereby imposes these punitive sanctions because of

the egregious nature of the violations of Rule 11 in the present case. This is not a typical Rule 11 case in which an attorney may have been a little careless or sloppy in filing an improper complaint. Plaintiffs' counsel alleged that high-ranking public officials of both Robeson County and the State of North Carolina willfully (Amended Complaint, Par. 58) violated the constitutional rights of a number of individuals, and then plaintiffs' counsel took pains to publicize these allegations through the media. Accordingly, this court imposes additional sanctions on William M. Kunstler, Barry Nakell, and Lewis Pitts each in the amount of TEN THOUSAND DOLLARS ($10,000) which shall not bear interest. These sanctions of TEN THOUSAND DOLLARS ($10,000) each shall be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina for credit and transmission to the Treasury of the United States.

This court further orders that until the aforementioned amounts are paid, with interest on those sums ordered to be paid with interest, William M. Kunstler, Barry Nakell and Lewis Pitts are hereby prohibited from appearing in or practicing before the United States District Court for the Eastern District of North Carolina.

Accordingly, it is hereby ORDERED that the motion of the defendants (State and County) for sanctions against William M. Kunstler, Barry Nakell, and Lewis Pitts is GRANTED in the amounts and forms specified above. It is further ORDERED that the plaintiffs' cross-motion for sanctions is DENIED.

This 28th day of September, 1989.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#22

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

Nos. A-634 (90-802, 90-807, 90-1094)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM M. KUNSTLER,
Petitioner,
v.
JOE FREEMAN BRITT, et al.,
Respondent.

LEWIS PITTS,
Petitioner,
v.
JOE FREEMAN BRITT, et al.,
Respondent

BARRY NAKELL,
Petitioner,
v.
JOE FREEMAN BRITT, et al.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION

LACY H. THORNBURG
Attorney General
(Counsel Listed on Back)

BEST AVAILABLE COPY

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QUESTIONS PRESENTED

1. Does the Civil Rights Act preclude a court from holding Plaintiffs' counsel, in a civil rights action, to the same standards of professional care established by Rule 11 as the court requires in all other litigation brought in the federal courts?

2. Where, as here, the record supports the findings of the district court sanctioning counsel on all three prongs of Rule 11 and where, as here, the court of appeals affirmed the district court's decision using the abuse of discretion standard mandated by *Cooter & Gell*, should the Supreme Court grant a further review of this matter because sanctioned counsel are dissatisfied with the lower courts' rulings?

3. Is a defendant prohibited from filing a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure following a Rule 41(a)(2) dismissal where the defendant -- prior to dismissal -- has not expressly reserved the right to seek sanctions?

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STATEMENT OF THE CASE

A. The Proceedings Below

On 31 January 1989, Plaintiffs, represented by the three petitioners here, filed the original complaint in this matter pursuant to 42 U.S.C. §1983 and sought money damages, a temporary restraining order, and preliminary injunctive relief. Plaintiffs filed a request for expedited discovery prior to completion of service of process. On 21 February 1989, defendants filed a motion for extension of time in which to answer or otherwise plead, and moved, pursuant to Fed.R.Civ.Proc. 11, to strike the complaint as to two plaintiffs. The district court extended defendants' response time to and including 20 March 1989. On 27 February, defendants sought a protective order staying discovery, and requested the district court to shorten the response time to that motion. United States District Judge Malcolm Howard, on 7 March, extended defendants' time in which to answer or plead, temporarily stayed discovery pending a ruling on the motion for a protective order, and directed plaintiffs to comply with Fed.R.Civ.Proc. 11 as well as Local Rule 2.04. Plaintiffs corrected their initial Rule 11 violations on 8 March.

On 16 March 1989, plaintiffs filed a First Amended Complaint, again seeking a temporary restraining order, preliminary injunctive relief, and money damages pursuant to 42 U.S.C. §1983. On 22 March, plaintiffs responded to defendants' Motion for Protective Order. The county defendants filed a Fed.R.Civ.Proc. 12(b) motion to dismiss on 29 March, followed by a similar motion from the state defendants on 31 March 1989. Plaintiffs moved for leave to file a voluntary dismissal with prejudice on 24 April. Judge Howard granted the motion and dismissed the action on 2 May.

The state defendants moved for sanctions against plaintiffs' counsel pursuant to Fed.R.Civ.Proc. 11 on 13 June, followed by a similar motion from the county defendants on 5 July. On 8 August plaintiffs' counsel moved for an evidentiary hearing on the pending Rule 11 motions, and, on 9 August, responded to the defendants' Rule 11 motions. Defendants filed a reply on 21 August. On 24 August, Judge Howard issued a notice of hearing on defendants' Rule 11 motion. The notice set the motions for oral argument on 8 September.

Plaintiffs' counsel filed a counter sanctions motion against counsel for the state defendants on 5 September. Judge Howard heard oral argument on the defendants' sanctions motions on 8 September. On 27 September, counsel for defendants filed affidavits setting forth the costs incurred by the state defendants. Judge Howard issued the sanctions order on 29 September, and also dismissed the plaintiffs' counsels' sanctions motion. Plaintiffs' counsel filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit and motion for stay on 10 October. Judge Howard granted the stay on 27 October 1989.

The United States Court of Appeals for the Fourth Circuit docketed the appeal of plaintiffs' counsel on 27 October 1989. Plaintiffs' counsel filed their brief on 9 February 1990, with defendants' brief following on 28 March 1990. Plaintiffs' counsel filed the joint appendix on 16 April 1990, with the court accepting a supplemental appendix on 7 May 1990 and a second supplemental joint appendix on 17 May 1990. Sanctioned counsel, by and through their own counsel, and defendants argued the case before the court of appeals on 5 June 1990. Subsequently, on 26 June 1990, Nakell and Pitts moved to proceed *pro se*, with each filing additional memoranda with the circuit court. Upon order of the panel, the defendants responded to the *pro se* memoranda on 24 July 1990. The circuit court issued its opinion on 18 September 1990. The three sanctioned counsel timely filed petitions for rehearing and suggestions for rehearing *en banc*, which the circuit court denied. Upon motion of Pitts and Kunstler, the circuit court stayed the mandate to and including 19 November 1990 to allow sanctioned counsel an opportunity to file petitions for certiorari with this Court. Each counsel subsequently petitioned this Court for certiorari, and the Court requested a response from these defendants.

B. Statement of the Facts

On 1 February 1988, Eddie Hatcher and Timothy Jacobs initiated a seizure at shotgun point of The Robesonian offices, a Lumberton, North Carolina newspaper, during which they held twenty (20) persons hostage. (Pitts Petition App A113-A114, ¶27)[1] Phillip Kirk, acting on behalf of the Governor, conducted tape recorded telephonic negotiations with Hatcher for the release of the hostages. A written agreement concluded that incident. (App 1a-28a; 29a-38a) Hatcher and Jacobs surrendered to federal authorities and remained in federal detention, charged with hostage taking and federal weapons violations, until the conclusion of their federal trial. (Pitts App A114-A116, ¶¶28-30) The Governor, in compliance with the agreement, formed a task force to examine the kidnappers' charges of Robeson County corruption.

Mr. Bruce Cunningham initially represented one of the defendants in the federal prosecution. Robert Warren of the Christic Institute appeared with Cunningham. In an 11 February 1988 meeting with Cunningham and Warren, Assistant United States Attorney John Stuart Bruce, the federal prosecutor, told Warren that a State kidnapping prosecution remained a possibility. Bruce also informed counsel that, to his knowledge, nobody entered a "no state prosecution" agreement with either Hatcher or Jacobs. (App 40a, ¶¶5-7) On 26 February 1988, Bruce provided a list of interviews and recordings available to the defense team. This material included transcripts of the telephonic negotiations between Hatcher and Phillip Kirk, as well as conversations among Hatcher, Jacobs, Tom Childrey (SBI Special Agent), Bruce Cunningham (a defense attorney), Connee Brayboy (editor of an Indian newspaper), Bob Horne (editor of The Robesonian), Sidney Lox (sic) (a state political leader from Robeson County), Lumberton Police Chief Albert Carol, and Joy Johnson (a local community leader). (App 43a-51a) Counsel could listen, by prior arrangement, to any of the audio recordings. Subsequently, Christic

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1 References to documents contained in Mr. Pitts' Appendix to his Petition to this Court will be noted as Pitts App hereafter.

Institute Attorney Lewis Pitts of the South Carolina Bar, New York Attorney William Kunstler, and University of North Carolina Law Professor Barry Nakell joined the defense team, with Pitts representing Jacobs, and Nakell filing a limited appearance on Hatcher's behalf. Nakell met with Bruce in late March, 1988. (App 53a-55a, ¶¶2-3)

Mr. Kunstler and two other attorneys entered a notice of general appearance on behalf of Hatcher, with Mr. Nakell entering a limited appearance. When called for trial, Mr. Kunstler and his associates moved to continue due to Mr. Kunstler's prior trial schedules. The district judge denied this motion since Hatcher stood represented by two other counsel as well as Mr. Nakell. Mr. Kunstler's associates and Mr. Nakell declined to accept full responsibility for trial. Mr. Hatcher then appeared on his own behalf, while Pitts represented Jacobs. (App 61a, ¶3) During the trial, Pitts argued that neither Hatcher nor Jacobs ever requested immunity from prosecution in exchange for the safe release of the hostages. Counsel also vigorously contested federal jurisdiction. (App 40a, ¶7) Martin McCall, Robeson County District Attorney Joe Freeman Britt's investigator, attended the federal trial as a spectator. (App 53a, ¶2)

The jury acquitted the defendants of all charges on 14 October 1988. Hatcher returned to Robeson County a few days after the verdict, while Jacobs remained outside. (App 61a-62a, ¶¶3,6) On 18 October 1988 Pitts and Nakell wrote a letter to Robeson County District Attorney Joe Freeman Britt (with a copy to Governor Martin's legal counsel James Trotter). (App 27a-28a) The letter noted that Pitts and Nakell understood from news reports that Britt's office was considering a state prosecution of Hatcher and Jacobs. Pitts and Nakell contended that they understood the agreement with the Governor's office would foreclose state criminal charges, and further assumed Britt dismissed the state warrants due to an agreement between the kidnappers and the governor's office that they would not be subject to Robeson County law enforcement authorities. The letter continued that counsel "... are confident that you will honor the agreement between Mr. Hatcher and Jacobs and the Governor's office." Trotter responded, on 19 October, and requested specifics concerning the claimed agreement. (App 31a-32a) Nakell replied on 8 November with a lengthy memorandum asserting that the *Bartkus*

v. Illinois, 359 U.S. 121 (1959) tool of the same authorities exception to dual prosecutions might apply to this case. Nakell recited no provision of the hostage release agreement which specifically set forth a "no state prosecution" promise. (App 33a-38a) Additionally, prior to 31 January 1989, Kirk met with Nakell and Pitts and informed both of them that the Governor never entered a "no state prosecution" agreement. (App 2a)

The Robeson Defense Committee held a meeting in Robeson County on 25 October 1988 attended by Pitts and Hatcher. Jacobs remained outside Robeson County. At an unspecified later date, the group decided to organize a petition drive to oust the sheriff, and conducted an organizational meeting on the evening of 9 November. (App 61a-62a, ¶6) The Thursday, 10 November 1988 editions of both The Robesonian and the Raleigh News and Observer reported that, on 9 November, then District Attorney Britt and State Bureau of Investigation Supervisor Ray M. Davis indicated that Britt, prior to 9 November, requested the SBI investigate possible conspiracy charges arising from the kidnapping incident. (App 67a-70a) The investigation constituted a continuation of SBI activity initiated on 1 February.

Pitts and Nakell first contacted Attorney General Thornburg on 3 November. At the 28 October meeting with the Governor's Task Force, the group informed Pitts and Nakell that the task force could not investigate their allegations of drug trafficking, but could only surrender to the United States Attorney's Office any evidence presented. Pitts and Nakell decided to contact the North Carolina Attorney General. (App 55a, ¶12) Nothing in the record demonstrates any involvement by the Attorney General with the hostage incident, release agreement, Governor's Task Force, or the federal or state prosecutions prior to this contact. Thornburg explained to Pitts and Nakell that he possessed no authority over the Robeson County Sheriff or the district attorney. (App 77a-79a) The meeting ended when Pitts insulted Thornburg. (App 55a-56a, ¶¶13-15) Alan Briggs, a member of the Attorney General's staff, also recounts this meeting. (App 71a-72a)

Subsequently, Nakell, in response to the press accounts of the conspiracy investigation, wrote a letter to Thornburg on 11 November. (App 81a-84a) Nakell complained that Michael Haddigan told him on 10 November that a reliable source told another reporter who

told Haddigan that the Christic Institute attorneys were targets of the conspiracy investigation. Haddigan did not know if the source was a law enforcement authority. On 13 December, Nakell again complained concerning the SBI investigation, and added complaints concerning the Robeson County Board of Education's conduct in making school facilities available to the Robeson Defense Committee, as well as the Robeson County Sheriff's purported refusal to provide security for school events. (App 85a-89a) Nakell provided no specifics, but lodged only vague complaints which evidenced no unlawful conduct. (App 77a-79a; 71a-75a)

Nakell made no contact with Sheriff Hubert Stone prior to filing the complaint. As Stone noted, the department did not provide security for the high school, but the school privately contracted with individual deputies. The Sheriff also explained that, on the night of the basketball game, he had held a personnel meeting which included the deputies. The meeting ran late. (App 91a-92a)

A Robeson County Grand Jury, on 6 December 1988, indicted Hatcher and Jacobs on fourteen counts of second degree kidnapping. The 7 December edition of The Robesonian quoted Kunstler stating the indictment "... is not technically double jeopardy, since hostage-taking and kidnapping are separate charges..." (App 93a) An article in the 13 April 1989 Leader entitled "Justice in Robeson County: Carrboro lawyers, Southern racism, bizarre politics, and death in the cocaine wilds" by Roy Pattishall reported that Pitts recognized, in December 1988, that the state kidnapping prosecution technically did not constitute double jeopardy. (App 95a)

Prior to 13 December, Nakell contends, Charles Bryant, Police Chief at Pembroke State University and Ed Jacobs, the Assistant Chief, informed Nakell that two SBI Agents visited Chief Bryant in his office and requested that Bryant obtain a copy of the Tuscarora tribal rolls from Keever Locklear. Bryant's first affidavit, drawn by or for Nakell and dated 2 August 1989, sets forth this alleged request. The affidavit never mentions when Chief Bryant provided Nakell this information. Bryant provided defendants a subsequent affidavit. (App 97a-98a) There, Chief Bryant notes that he never spoke with Nakell nor to anyone acting on Nakell's behalf concerning the SBI meeting until sometime in May, 1989, when Nakell appeared in the Chief's office and questioned him concerning the Chief's meeting

with the SBI. Subsequently, on 2 August 1989, an unknown male appeared with a typed affidavit. Chief Bryant quickly read over the affidavit, noted that, although not in the Chief's words, the affidavit appeared to contain what the Chief told Nakell, and signed the document. On 17 August 1989, Chief Bryant carefully read the affidavit he provided Nakell and discovered that it stated that the SBI Agents had requested that the Chief obtain the tribal rolls. The SBI Agents never so requested, and the Chief never told Mr. Nakell the SBI Agents had. (App 97a-98a) Assistant Chief Ed Jacobs filed no affidavit.

Timothy Jacobs telephoned Bob Horne, editor of The Robesonian, on Tuesday evening, 20 December 1988. The Wednesday, 21 December 1988 edition of The Robesonian contained an article by Horne entitled "Remorseful Jacobs: Hatcher 'has just destroyed me'" which reported that Jacobs expressed extreme disagreement with Hatcher's conduct. (App 103a-105a) By this time, Hatcher had fled the jurisdiction to an unknown location, while Jacobs fled to New York. New York authorities arrested him after the vehicle he operated collided with a school bus and Jacobs attempted to flee. He awaited an extradition hearing. Subsequently, on 22 December, SBI Agent James Bowman visited Eleanor Jacobs, and expressed concern for Timothy. (App 101a; 107a-108a) Bowman again visited Mrs. Jacobs on the 29th to respond to Mrs. Jacobs' questions raised during the first discussion concerning possible custody arrangements should Jacobs return. Mrs. Jacobs declined to speak with him since she had not yet dressed for the day, and Bowman agreed to telephone her that evening. On the evening of 29 December, Bowman, true to his promise, telephoned Mrs. Jacobs. Pitts set up recording equipment and recorded part (but not all) of the conversation. In the portion transcribed and filed with the district court, Bowman discusses Pitts' representation of Jacobs in the New York hearing. Bowman indicated that he would speak with the North Carolina judicial authorities concerning an unsecured bond if Jacobs, in a show of good faith, waived extradition and voluntarily returned to North Carolina. In any event, Bowman would ensure that Jacobs, upon his return, would be confined in a facility other than the Robeson County Jail. He also told Mrs. Jacobs, in response to her probing, that he believed the people surrounding her son were more interested in publicity than in

his best interests. These contacts occurred only after The Robesonian published Jacobs' split with Hatcher.

Welbert Jacobs, Timothy Jacobs' grandfather and relative of Lee Sampson, the district attorney's witness coordinator, contacted Sampson prior to the indictments and inquired concerning the status of possible state charges against his grandson. Subsequently, in another taped call, Welbert questioned Sampson on a series of issues including the possibility of Jacobs testifying for the state; the specific nature and extent of that possible testimony; and Sampson's views concerning the Christic Institute Attorneys. Neither Sampson nor Bowman ever contacted Jacobs, and neither Jacobs' grandfather nor father filed affidavits with the district court.

According to his own affidavit, on 1 January 1989, Nakell began his research into the law and the facts of the case. By 16 January, he circulated a first draft, and ultimately, on 27 January, met with Pitts, reviewed the complaint, and finalized it over the weekend. On 27 January, Connee Brayboy, editor of the Indian Voice and a community leader, telephoned Pitts. With Nakell listening, Brayboy stated that Richard Townsend, the new District Attorney, said he would work with any lawyer representing Jacobs. (App 58a-59a, ¶¶44-46)

Connee Brayboy confirms and amplifies this conversation. She and Ray Littleturtle, another community leader, met with Richard Townsend on or about 23 January. Brayboy informed Townsend that she had recently spoken with Jacobs and that Jacobs expressed dissatisfaction with his representation by the Christic Institute and Pitts. Jacobs told Brayboy that he wished to dismiss Pitts, end his extradition fight, and enter a plea bargain. Townsend said he could not involve himself in Jacobs' choice of counsel and that he would work with whomever Jacobs chose. Brayboy relayed this information to Pitts on or about 26 January. Pitts inquired three (3) times if Townsend advised Jacobs to obtain different counsel. Brayboy repeatedly informed Pitts that Townsend stated he could not involve himself in Jacobs' choice of counsel and that the District Attorney would deal with whomever Jacobs chose. (App 109a-110a)

Pitts and Nakell discussed the possibility of a plea bargain. Nakell encouraged Pitts to pursue any plea bargaining opportunity, as he had done earlier. Nakell reports that Pitts stated that "If such should

materialize and it should require Mr. Jacobs to withdraw from the suit, he thought the plea opportunity should still take priority for Mr. Jacobs." (App 59a-60a, ¶47) Thus, even before filing the action, Pitts expressed a willingness to offer up the civil action as part of a plea bargain in the state criminal cases. The district attorney, however, declined to accept anything less than a felony plea.

Nakell and Pitts met again on 30 January, and again spoke with Connee Brayboy. Pitts arranged to meet with Townsend on 31 January. That meeting produced no acceptable plea bargain and, following the meeting, Pitts telephoned his staff and approved filing the suit. (App 60a, ¶49; 62a-63a, ¶37) After filing the complaint in the Fayetteville Division, Pitts conducted a press conference on the steps of the Robeson County Courthouse before an assembly of television reporters and other media. Pitts remarked that "... now we have the subpoena power." (App 111a) The filing and press conference occurred on the anniversary eve of the kidnapping.

Superior Court Judge Anthony Brannon (the Judge assigned to Robeson County for that six month period), wrote letters to Pitts and Nakell dated 27 January inquiring whether, to these lawyers' knowledge, either defendant possessed counsel in the Robeson County criminal cases. Noting that Nakell and Pitts previously represented Hatcher and Jacobs, respectively, in the federal hostage taking prosecution, Judge Brannon inquired whether either attorney represented Hatcher or Jacobs in the Robeson County criminal cases. The state criminal file contained no notice of appearance or other indication of representation as required by N.C.G.S. §15A-141 *et.seq.* Judge Brannon requested each counsel to notify their former client of the request and of Judge Brannon's expressed willingness to appoint counsel in the state kidnapping charges. (App 113a) By letter dated 30 January 1989, Pitts informed Judge Brannon that he discussed the letter with Jacobs and informed the judge that "...We are representing Mr. Jacobs before the court in Madison County, New York." (App 115a) Mr. Nakell replied, by letter dated 31 January,

> I assumed Ms. Bowman would continue to represent Mr. Hatcher in her capacity as an Assistant Public Defender....I am enclosing for your information a copy of a Complaint that was filed in Federal Court today because I think it will explain to you some of the background underlying this case, including some

> developments that I am advised might have been brought to your attention.

(App 117a)

Thus, on and before 31 January, neither Pitts nor Nakell represented either Hatcher or Jacobs in the Robeson County kidnapping charges. Subsequently, a number of attorneys and community leaders contacted the Robeson County District Attorney purportedly on Jacobs' behalf but entered no notice of appearance.

Sometime in March, Judge Brannon spoke with Special Deputy Attorney General Joan Byers concerning another matter. North Carolina superior court judges possess no law clerks nor other legal assistants, and frequently rely upon members of the Attorney General's Staff for assistance. Gordon Widenhouse, an experienced Assistant Appellate Defender, sat in Ms. Byers' office during that conversation. Ms. Byers inquired if Jacobs had retained counsel in the criminal cases. Upon learning that Jacobs had not, and upon learning that Judge Brannon preferred to appoint counsel from the Cumberland County Bar since Jacobs would be housed in the Cumberland County jail, Ms. Byers volunteered to ask Mr. Widenhouse who he thought would be a good criminal defense attorney from Cumberland County. Mr. Widenhouse provided several names, which Ms. Byers repeated to Judge Brannon. The list included James Parish. (App 119a-121a; 127a) Judge Brannon ultimately appointed Mr. Parish as counsel for Jacobs. Mr. Widenhouse apparently relayed the conversation to his superior. Not until 22 April 1989, some two (2) days after Nakell sought to dismiss the case, did Appellate Defender Malcolm Ray Hunter inform counsel from the Christic Institute of these matters. (App 127a)

On 31 January 1989, Mr. Nakell filed the original complaint in the United States District Court for the Eastern District of North Carolina. On that date, Neither Hatcher nor Jacobs remained within the Eastern District of North Carolina. Both were fugitives from Robeson County, with Jacobs in custody in New York awaiting an extradition hearing and Hatcher's location still unknown. The complaint bore the typed names of Lewis Pitts, Gayle Korotkin, and Alan Gregory of the Christic Institute South, and G. Flint Taylor of Chicago (the outside expert to whom petitioners forwarded the draft complaint for an opinion as to its validity) as counsel for Eleanor Jacobs and

Timothy Jacobs. None of those counsel signed the complaint as required by Rule 11, and none of them stood licensed to practice before the Eastern District. Mr. Nakell signed for the remaining plaintiffs. Defendants' counsel immediately, on 21 February, filed a Rule 11 motion based upon that failure, and followed, on 27 February, with a motion for extension of time to answer or otherwise plead. Due to the fact that no licensed counsel signed or appeared for Eleanor Jacobs or Timothy Jacobs, Defendants served a copy of the motions directly upon those plaintiffs. The district court ordered Plaintiffs to comply with Rule 11 on 7 March. Plaintiffs remedied their initial Rule 11 violation on 8 March, with Mr. Nakell signing the original complaint as counsel for all plaintiffs.

On 15 February 1989, Plaintiffs sought leave to depose, immediately, SBI Special Agent James Bowman. Counsel presented no justification for this untimely deposition which they sought even before completing service of process. Jacobs, however, faced an extradition hearing on 28 February in New York. Petitioner Pitts represented Jacobs in that New York proceeding. Bowman served as case agent in North Carolina and possessed significant information Pitts believed relevant to the extradition proceeding which counsel probably could not obtain through criminal discovery, and certainly not in time to assist in the extradition hearing. Defendants sought a protective order, and requested the district court to shorten the response time to the motion. The district court granted a temporary stay of discovery pending completion of service on all defendants and a response from the Plaintiffs to the Defendants' motion for a protective order. (Docket Nos. 5, 6B, 7, 8B, 10, 11B)

Pitts appeared at Jacob's extradition hearing in late February. Bowman testified and faced a lengthy cross examination in which he identified the SBI "Does" named in the complaints. (Transcript of Extradition Hearing Docket No. 36B, Exh 5) Neal Rose, the Madison County New York District Attorney, prosecuted the case for the state. In an affidavit filed with the district court, Rose related that Pitts stated that he would drop the North Carolina civil action if Jacobs received an acceptable plea bargain. Pitts also told Rose that he commenced the civil action as leverage to influence a plea bargain and clearly implied that he possessed no factual basis for the civil action. (App 129a-130a) Alan Rosenthal, a New York Attorney who

appeared with Pitts, filed an affidavit contending that he accompanied Pitts in all chambers conferences. According to Rosenthal, Pitts never stated that he commenced the civil action solely for leverage in a plea bargain nor did Pitts ever imply that the action lacked a factual basis. Rosenthal does acknowledge, however, that Pitts indicated he would discontinue the lawsuit if it might make the Robeson County District Attorney more willing to discuss negotiating a plea agreement. (App 131a-132a, ¶7) Pitts states in his Affidavit that "We never made any effort to use the lawsuit for plea bargaining leverage and we never believed it could have that effect." He also states that "Had Mr. Townsend offered to dismiss the criminal prosecution against Plaintiff Timothy Jacobs in exchange for dismissal of their action, however, I am sure that Plaintiffs Timothy Jacobs and Eleanor Jacobs would have agreed to that." (App 63a, ¶38) Pitts never denies Rose's allegations, but states, in reference to his dealings with Jacobs' appointed defense attorney James Parish, that "At no time did I suggest or recommend that this civil suit be used in any way as leverage or as a bargaining chip in negotiating a plea for Mr. Jacobs." (App 65a-66a, ¶51)

Jacobs appealed to the New York Appellate Division after losing the extradition hearing. In denying Jacobs' claims following a full evidentiary hearing, Madison County New York Judge William F. O'Brien III noted in his 14 March 1989 order:

> Lastly, and regrettably, what was first conceived to be an evidentiary hearing in a court of law of this state on the matter of petitioner's claim of grave danger to his life if he were to be returned to North Carolina, instead had been converted by petitioner and his counsel into a media event, a grand spectacle in a northern courtroom designed to indict the system of justice of a southern state. A spectacle complete with courthouse demonstrations, rallies, mass media attention, telephone and letter writing campaigns to the court, and the constant beat of the drums outside of this courthouse for days upon end. A proceeding here, rife with hearsay, double hearsay, inadmissible opinion evidence, rumor, gossip, speculation and innuendo. For such a serious matter, much more was due here than what this Court heard and witnessed during this proceeding.

On 21 March 1989, the New York Appellate Division denied his application for stay and bail. Jacobs ended any further appeals of the extradition order, and returned to North Carolina on or about 23 March 1989. On 24 March, Superior Court Judge Brannon conducted a first appearance hearing and appointed Mr. James Parish of the Cumberland County Bar to represent Jacobs following Jacobs' request. Pitts arranged for Mr. Alex Charns to appear for Jacobs at that hearing, since Pitts did not represent Jacobs in the criminal cases and was not licensed to practice in North Carolina. (App 63a-65a, ¶¶47-49) Jacobs, while represented by James Parish, ultimately pled guilty to fourteen (14) counts of second degree kidnapping and received a split prison sentence.

With the Defendants' answers to the Compiaint due on 20 March, Plaintiffs, on 16 March, filed a First Amended Complaint. The First Amended Complaint bore the signatures of all three sanctioned counsel, and again sought injunctive relief, including a temporary restraining order. (Pitts App A100-A142) Despite the purportedly critical and ongoing civil rights violations, and the desperate need for discovery, Plaintiffs made no reply to the Defendants' 27 February motion for a protective order until 22 March, some six (6) days after filing the first amended complaint. In that response, Plaintiffs noted that, as a result of the untimely deposition of James Bowman, they would be in a position to make the showing required by Rule 65(b) for the injunctive relief which they had already requested. (App 133a)

Plaintiffs filed both complaints pursuant to 42 U.S.C. §1983 asserting a deprivation of constitutional rights under color of state law. The plaintiffs included the Robeson Defense Committee, an unincorporated association (Pitts App A102-A103, ¶8); Carnell Locklear, a Native American resident of Robeson County and Chairman of the Board of the Committee (Pitts App A101-A103, ¶¶1 & 8); Mary Sanderson, a Native American resident of Robeson County and a member of the Committee board (Pitts App A101-A103, ¶¶2 & 8); Thelma Clark, a Native American resident of Robeson County and a member of the Committee board and mother of Eddie Hatcher (Pitts App A101-A103, ¶¶3 & 8); Eleanor Jacobs, a Native American resident of Robeson County, a member of the Committee board and mother of Timothy Jacobs (Pitts App A101-A103, ¶¶4 & 8); Betty

McKellar, a Black resident of Robeson County (Pitts App A102, ¶5); Eddie Hatcher, a Native American resident of Robeson County (then held in federal custody in California) (Pitts App A102, ¶6); and Timothy Jacobs, a Native American resident of Robeson County then fighting extradition from the State of New York (Pits App A102, ¶7). Jacobs unsuccessfully fought, and subsequently waived extradition to North Carolina. Hatcher unsuccessfully fought, and subsequently waived extradition from California.

Defendants in the action included Governor James G. Martin, in his official capacity (Pitts App A107-A108, ¶19); Joe Freeman Britt, until 1 January 1989 the duly elected District Attorney of North Carolina Judicial District 16, which included Robeson County, in his individual capacity (Pitts App A103-105, ¶9); Richard Townsend, individually and in his official capacity as Assistant District Attorney and, on and after 1 January 1989, District Attorney of North Carolina Judicial District 16B (Pitts App A104-A105, ¶10); Lacy Thornburg, individually and in his official capacity as Attorney General of North Carolina (Pitts App A106, ¶13); Robert Morgan, individually and in his official capacity as Director of the State Bureau of Investigation (Pitts App A106-A107, ¶14); James Bowman, individually and in his official capacity as Agent of the State Bureau of Investigation (Pitts App A107, ¶15); and Lee Edward Sampson, individually and in his official capacity as an employee of the District Attorney of Judicial District 16 or 16B (Pitts App A105, ¶11) The complaint also named as parties defendant John Doe State Bureau of Investigation Agents individually and in their official capacities (Pitts App A107, ¶17), and John Doe Assistant District Attorneys, individually and in their official capacities as members of the staff of the Robeson County District Attorney (Pitts App A107, ¶16); and Robeson County, Sheriff Stone, and Deputy Does (Pitts App A105-A107, ¶¶12 & 18).

All three sanctioned counsel signed the first amended complaint, which again bore G. Flint Taylor's typed name on the signature page. The twenty-nine page document first alleged the status of the plaintiffs and the numerous defendants. Paragraph twenty-four (24) began the plaintiffs' "Preliminary Statement" in which plaintiffs expressed their views concerning the political climate in Robeson County (Pitts App A110-A113, ¶¶24-26).

The first amended complaint alleged that defendant Governor James G. Martin, acting through Chief of Staff Phillip J. Kirk, Jr., and with legal counsel James R. Trotter as well as Secretary of Crime Control and Public Safety Joe Dean, negotiated an agreement with plaintiffs Hatcher and Jacobs (at the time holding hostages at shotgun point in the offices of The Robesonian) that they would not be subject to the jurisdiction of Robeson County law enforcement authorities. (Pitts App A114-A115, ¶28) Plaintiffs asserted, on information and belief, that defendant James G. Martin entered into an agreement with defendant Joe Freeman Britt and defendant Lacy Thornburg, or either of them, and the office of the United States Attorney, that Hatcher and Jacobs would be prosecuted in federal and not state court for any crimes arising out of the takeover of The Robesonian, and that defendant Joe Freeman Britt dismissed the state charges pursuant to that agreement. (Pitts App A115-A122, ¶¶29-39) Plaintiffs recited that defendants stood trial in federal court for Conspiracy; Hostage-taking; Use of Firearms in the Commission of Hostage-taking; Manufacture of a Sawed-Off Shotgun; Possession of a Sawed-Off Shotgun and False Threats. At that trial, the complaints asserted, Hatcher and Jacobs presented a joint defense though represented by separate counsel, and continued to do so with regard to possible state charges. (Pitts App A115-A117, ¶¶29-31)

Following their federal acquittal, they asserted, Hatcher returned to Robeson County and began work with the Robeson Defense Committee and the other plaintiffs to encourage political change in the county. Defendants alleged plaintiffs engaged in lawful First Amendment activities. (Pitts App A117-A118, ¶32) In the next paragraph, plaintiffs alleged, on information and belief, that Joe Freeman Britt, Hubert Stone, Lee Edward Sampson, Lacy Thornburg, Robert Morgan, James Bowman, District Attorney Does, Deputy Sheriff Does, and SBI Does,

> ...or any two of them, conspired and agreed among and/or between themselves and diverse others to conduct a campaign of intimidation and harassment against Plaintiffs and Plaintiffs' supporters and/or sympathizers, with the designed purpose and/or foreseeable effect being (1) to discourage other persons from participating in any lawful activities conducted by Plaintiffs out of fear of retaliation against such persons by said Defendants; (2) to stop Plain-

> tiffs from engaging in such activities by frightening other persons into refusing their cooperation; (3) to prevent Plaintiffs Eddie Hatcher and Timothy Jacobs from engaging in such activities by charging them with felonies and incarcerating them in the Robeson County Jail; (4) to discredit Plaintiffs by charging Plaintiffs Eddie Hatcher and Timothy Jacobs with felonies and by disseminating false and misleading information about them through the print and electronic media and otherwise; and (5) to exploit the campaign of intimidation and harassment to secure the appointment of Defendant Richard Townsend as District Attorney, to replace Defendant Joe Freeman Britt, who was scheduled to resign as District Attorney in the middle of his term to become a Superior Court Judge on January 1, 1989.

Complaint (Pitts App A118-A119, ¶33)

The first amended complaint asserted that, in furtherance of the conspiracy, the defendants committed numerous acts, including: (1) Joe Freeman Britt and Richard Townsend, on or about 6 December 1988, convened a state grand jury to indict Plaintiffs Eddie Hatcher and Timothy Jacobs. The grand jury indicted Hatcher and Jacobs on fourteen (14) counts of second degree kidnapping arising from the takeover of The Robesonian. These charges arose out of the same events which gave rise to the federal hostage-taking and other charges on which the federal jury acquitted plaintiffs (Pitts App A119-A120, ¶34); (2) Joe Freeman Britt and SBI Does I-III, or any one of them,

> ..reportedly did represent or cause to be represented to members of the press . . . false and/or misleading statements suggesting that persons other than Plaintiffs Eddie Hatcher and Timothy Jacobs conspired and/or otherwise participated in the planning of the February 1, 1988 takeover of THE ROBESONIAN and that an intensive investigation into whether Plaintiffs Eddie Hatcher and Timothy Jacobs had conspired with others was in progress and that Plaintiff Jacobs' attorneys were targets of the investigation. No such charges have ever been filed.

(Pitts App A121, ¶36) (3) On information and belief, Defendant Britt, in early November 1988, informed the press that the SBI expanded its investigation to include the possibility of obstruction of justice and interference with state witnesses charges, then declined to comment further. The District Attorney filed no such charges. (Pitts

App A122, ¶37) Defendants made these statements in violation of investigatory policies and procedures as well as "...for the designed purpose and/or the anticipated effect of intimidating Plaintiffs and their supporters and of suppressing political dissent." (Pitts App A122, ¶38)

The first amended complaint alleged that Jacobs' North Carolina counsel appeared on his behalf in New York. On 14 December 1988, the unnamed North Carolina counsel wrote Governor Martin asking that Martin not seek extradition (Pitts App A122, ¶39) Defendants next allege that defendants Lee Edward Sampson, James Bowman, and Richard Townsend, allegedly under the direction, control and/or supervision of Joe Freeman Britt and Richard Townsend, approached the family and friends of Jacobs, without notice to Jacobs' counsel, and requested the family and friends communicate "...certain information, vague promises and offers ..." including: (1) that he should dismiss his present attorneys and retain local attorneys or seek to have the court appoint local attorneys to represent him; (2) that his present counsel were not loyal to his interests, but were instead seeking only to advance themselves through the media; (3) that he would be better served by a local attorney who could "work in the system"; (4) Jacobs should voluntarily return to North Carolina, testify against Hatcher, and implicate other persons in a conspiracy; and (5) Jacobs would thereby earn "Green Stamps". Plaintiffs asserted these actions

> ... were designed to and/or had the anticipated effect of interfering with Plaintiff Timothy Jacobs' exercise of his right to counsel and/or of disrupting the relationship between said Plaintiff and his counsel and the joint defense of Plaintiffs Timothy Jacobs and Eddie Hatcher.

(Pitts App A122-A124, ¶40) The first amended complaint further alleged that defendant James Bowman and SBI Does I-III interrogated, in a harassing and intimidating manner, friends, supporters, and associates of Hatcher and Jacobs. Particularly, Bowman and the "Does" questioned leaders and members of the Tuscarora Nation and supporters of the Robeson Defense Committee concerning the tribal and Committee membership rolls. The first amended complaint charged Bowman and the unnamed agents designed such interrogations (and/or the interrogations had the anticipated effect) to intimi-

date and frighten persons from exercising their First Amendment rights. (Pitts App A124-A125, ¶41)

The first amended complaint alleged that Joe Freeman Britt, Richard Townsend, Lacy Thornburg, and Robert Morgan, or any two of them, utilized the campaign of intimidation and harassment to make Hatcher and Jacobs' state prosecution an issue in the appointment of a new district attorney, and to portray Richard Townsend as the most suitable candidate. Pursuant to that campaign goal, the filing charged, the defendants caused the SBI Agents to pursue an investigation of the Republican candidate for the purpose of discrediting the viability of his candidacy. (Pitts App A126-A127, ¶44) Finally, the first amended complaint alleged as facts, on information and belief, that defendants, or any two of them, further conspired and agreed to conceal the existence of the conspiracy and the campaign of intimidation and harassment. (Pitts App A127-A128, ¶45)

The first amended complaint asserted that Sheriff Stone and the Deputies retaliated against plaintiffs and school officials for the plaintiffs' use of school facilities by refusing security services at a basketball game. (Pitts App A125-A126, ¶42) Plaintiffs also alleged that Robeson County Sheriff Stone engaged in generalized corruption. (Pitts App A110-A113) Subsequently, plaintiffs attempted to link the county defendants to the state criminal proceeding. (Pitts App A118-A120, ¶¶33-34)

Following pleading of the facts, the first amended complaint asserted against the defendants six causes of action in addition to a claim of willful and wanton conduct. The first claim alleged that, pursuant to the campaign of intimidation and harassment, defendants unlawfully interfered and/or attempted to interfere with plaintiffs' protected First Amendment activities in violation of 42 U.S.C. §1983. This claim included an assertion that defendants disseminated threatening and false information about plaintiffs to deter them from engaging in First Amendment activities, and to deter others from associating and cooperating with plaintiffs in their exercise of their First Amendment freedoms. (Pitts App A128-A129, ¶¶46-48)

The second claim alleged that, as part of the campaign of intimidation and harassment, Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, and James Bowman intentionally interfered and/or attempted to interfere with the attorney-client relationship

between Jacobs and his attorneys, in violation of Jacobs' First, Fifth, Sixth, and Fourteenth Amendment rights. Pursuant to the campaign, defendants purportedly attempted to sow dissension and distrust between Hatcher and Jacobs, and Jacobs and his attorneys, to disrupt the joint defense. (Pitts App A129-A130, ¶¶49-50)

The third claim contended that, pursuant to the campaign of intimidation and harassment, Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, and James Bowman attempted to coerce incriminating testimony from Jacobs against Hatcher in violation of Hatcher's Fifth and Fourteenth Amendment rights (Pitts App A130, ¶51). The fourth claim asserted that, pursuant to the campaign of intimidation and harassment, James Bowman and SBI "Does" I-III interrogated friends, supporters and associates of Hatcher and Jacobs, including members of the Robeson Defense Committee for the purpose of intimidating citizens and suppressing political dissent. (Pitts App A130-A131, ¶52)

Although unlabeled as such, the fifth claim alleged that the Sheriff and Deputy "Does" coerced, intimidated and harassed third parties into taking action adverse to plaintiffs for the purpose of preventing plaintiffs' exercise of their First Amendment rights. (Pitts App A131, ¶53) The sixth claim asserted that, pursuant to the campaign of intimidation and harassment, Joe Freeman Britt and Richard Townsend "... abusively and in bad faith ..." convened a grand jury for the purpose of suppressing political dissent by causing the grand jury to indict Hatcher and Jacobs on state charges in violation of their First and Fourteenth Amendment rights. (Pitts App A131-A132, ¶54) Additionally, the first amended complaint averred that Joe Freeman Britt and Richard Townsend initiated and pursued the criminal prosecution in contravention of an agreement made by Governor Martin and in violation of the double jeopardy provisions of the Fifth Amendment. (Pitts App A132, ¶55)

The seventh claim alleged that Thornburg and Morgan were, or should have been aware of, the actions taken by Bowman, Britt, Sampson, Stone, SBI Does I-III, Deputy Sheriff Does I-V, and DA Does I-III, or any one of them, and approved, acquiesced in, tacitly authorized, or were deliberately indifferent to those actions. (Pitts App A132-A133, ¶56)

Paragraph fifty-seven (Pitts App A133-A135, ¶57) purported to summarize the preceding twenty-two page complaint by alleging damage in that:

> (A) The campaign of intimidation and harassment substantially and materially interfered with all plaintiffs' First Amendment protected activities and had a chilling effect upon the First Amendment protected activities of many persons who theretofore expressed a desire and/or intent to join, support, or associate with plaintiffs' activities but are now afraid to do so;
>
> (B) The Campaign of intimidation and harassment resulted in the bad faith prosecution of Hatcher and Jacobs, in violation of Due Process and Double Jeopardy protections and in violation of the agreement made by the Governor;
>
> (C) The campaign of intimidation and harassment resulted in substantial and material and apparently irreparable disruption of defense preparation due to the violation of their right to counsel guaranteed by the Due Process clause of the Fourteenth Amendment.

Finally, the first amended complaint asserted that the defendants "...disregarded their professional duties and responsibilities . . ." and stood guilty of willful and wanton conduct which evidenced a reckless disregard of plaintiffs' rights. (Pitts App A135, ¶58)

On 29 March and 31 March, Respondents here filed Rule 12 motions to dismiss, accompanied by extensive affidavits from the state defendants. Plaintiffs never replied to those filings. Instead, on 20 April 1989, Nakell telephoned Ms. Byers and sought a stipulated dismissal. Ms. Byers returned his call sometime later, and indicated that the defendants would not oppose a motion for leave to dismiss with prejudice, but refused to stipulate to a dismissal pursuant to Rule 41(A)(1). Ms. Byers specifically inquired if the dismissal was unconditional and with prejudice. Mr. Nakell replied that it was. (App 120a-125a; 135a) The district court granted the motion for leave to dismiss and terminated the action on 2 May 1989. (App 137a)

On 13 June 1989, the state defendants filed their Rule 11 motion accompanied by affidavits and other exhibits, with the county filing a separate Rule 11 action on 5 July 1989. (Docket Nos. 34, 35B,

36B, 39 & 40B) Following the Rule 11 motion, Mr. Nakell contacted Ms. Byers and Chief Deputy Attorney General Andrew A. Vanore, Jr. and indicated that he wished to talk. Nakell made this contact with Mr. Vanore despite the knowledge that Mr. Vanore never participated in this litigation and despite the fact that the undersigned counsel represented the Governor, Attorney General, and other state defendants in this matter.

Plaintiffs sought, on 6 July, an extension of time to respond to the sanctions motions to and including 26 July 1989. Judge Malcolm Howard granted that request. Subsequently, on 17 July 1989, Petitioners, then represented by Morton Stavis of the Center for Constitutional Rights, again sought additional time to respond to the Rule 11 motions. Judge Malcolm Howard allowed a second extension until 7 August to respond to the Rule 11 motions.

Petitioners filed a forty-three (43) page memorandum in opposition to the sanctions motions, with a twenty-four (24) page appendix attached containing additional legal argument. Petitioners accompanied the memorandum with an additional appendix containing fifty-six (56) separately numbered exhibits. (Docket No. 52) The appendix contained a fifty-seven page affidavit from Mr. Nakell detailing his participation in the case, including his research into the law and his investigation into the facts; a thirty-five (35) page affidavit from Pitts of similar nature; a one page affidavit from Mr. Kunstler in which he explained that he did not participate in the litigation, but left Mr. Nakell to prepare and file the Complaint (App 139a); affidavits from some of the plaintiffs; and newspaper accounts concerning various aspects of the case. Notable by their absence, the filings contained affidavits from neither Hatcher nor Jacobs. Petitioners also moved for an evidentiary hearing on these Rule 11 issues. (Docket Nos. 52 & 51)

Respondents filed a reply memorandum with additional affidavits on 21 August. (Docket Nos. 55B & 56B) The district court issued a notice of hearing on 25 August setting the Rule 11 motions for oral argument on 8 September before Judge Howard in Raleigh.

On 5 September, three (3) days prior to oral argument before the district court, Petitioners filed what they described as a counter Rule 11 motion seeking sanctions against Respondents' counsel based upon their original Rule 11 motion. (Docket Nos. 59, 60B & 61B)

Petitioners accompanied that filing with a voluminous memorandum in support of sanctions complete with supplemental appendix, and, once again, sought discovery and an evidentiary hearing.

Judge Howard heard oral argument on the Respondent's Rule 11 motions on 5 September 1989. Mr. Morton Stavis and Mr. George Cochran represented the sanctioned counsel, with Mr. Pitts and Mr. Nakell seated at counsel table. At the conclusion of Mr. Stavis' argument, Mr. Nakell rose and wished to address the court as a point of personal privilege. A transcript of that hearing appears as part of the district court record.

On 19 September, Judge Howard wrote to counsel for Respondents and requested fee affidavits. Respondents provided those affidavits on 27 September, and the district court issued the sanctions order on 29 September 1989.

SUMMARY OF THE ARGUMENTS FOR DENIAL OF CERTIORARI

Despite the shrill rhetoric of Petitioners and their amici, the decision of the Fourth Circuit stands well based in law and does not conflict with other circuits or this Court's Rule 11 precedents. Indeed, much of the Fourth Circuit's opinion upholding sanctions against these three attorneys was mandated by *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990).

There should be no Civil Rights Act exception to Rule 11. Litigants pursuant to this statute should be required to adhere to the same norms of professional behavior demanded of any litigant. Rule 11 certainly does not constitute a violation of the Rules Enabling Act since it is not a fee shifting mechanism which would defeat the attorneys fees provisions contained in the Civil Rights Act.

The Fourth Circuit employed the standard of review set out in *Cooter & Gell* to review the district court's determination that each of the three prongs of Rule 11 were violated by the petitioners. The record fully supports the district court's findings, as the court of appeals concluded. Thus, Petitioners ask this Court simply to act as a court of errors in hopes that this Court would reach a different

determination from the material than the two lower courts. This does not suggest a certiorari worthy issue.

The Fourth Circuit correctly held a voluntary dismissal pursuant to Rule 41(a)(2) does not and should not preclude Rule 11 sanctions against a litigant for sanctionable conduct during the course of the litigation. This result appears mandated by *Cooter & Gell*, and is not in conflict with other circuits. Indeed, this ruling is clearly in harmony with the Rule 11's aim to deter baseless litigation.

Finally, the Fourth Circuit properly upheld the district court's finding of the improper purpose prong of Rule 11 without holding an evidentiary hearing. Under the particular circumstances of this case, including the wealth of detailed, circumstantial evidence, an evidentiary hearing was not necessary for the district court to determine this suit was brought for an improper purpose.

There appears no certiorari worthy issue in this case since the issues presented deal with pleas to re-examine the application of law to the facts or to determine minor variations of matters already determined in this Court's precedents. No issue in this case presents a claim of sufficient importance to warrant this Court's review.

REASONS WHY THE WRIT OUGHT NOT ISSUE

I. RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE HAS NO CIVIL RIGHTS ACT EXCEPTION TO ITS SCOPE; CERTIORARI OUGHT NOT ISSUE TO REVIEW SUCH A BASELESS CLAIM.

Petitioner Lewis Pitts, as well as amici National Council of Churches of Christ, *et al.*, suggests review of this case appears warranted since the use of Rule 11 in Civil Rights litigation allegedly interferes with the purposes of the Civil Rights Act. Such assertions warrant no review by this Court.

The Civil Rights Act does not exempt parties suing pursuant to its jurisdiction from Rule 11. Rule 11 of the Federal Rules of Civil Procedure does not have a civil rights exception to its reach. This Court has stated that "[w]e give the Federal Rules of Civil Procedure their plain meaning " *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, ____, 110 S.Ct. 456, 458 (1989). Indeed, ". . .

this Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to us to achieve a better result." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, ___, 111 S.Ct. 922, ___ (1991).

Since there is no statutory basis for suggesting a civil rights exception to Rule 11 or other such sanctions, this Court ought not create one. The Courts which have considered such a claim have rejected it out of hand. *Oliveri v. Thompson*, 803 F.2d 1265, 1280-81 (2nd Cir. 1986), *Blue v. U.S. Department of the Army*, 914 F.2d 525 (4th Cir. 1990), *cert pending*, No. 90-1076, *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979), *Butler v. Department of Agriculture*, 826 F.2d 409 (5th Cir. 1987). *cf.*, *Roadway Express Co. v. Piper*, 447 U.S. 752, 762 (1980) (Dilatory practices by civil rights plaintiffs are as objectionable as those of defendants).

Pitts and amici Church of Christ, *et al.* argue that the application of Rule 11 to civil rights litigators chills the important societal goal of redressing claims of governmental malfeasance in the federal courts. However, it is absurd to suggest that colorable claims will not be brought in Civil Rights cases simply because sanctions are levied in patently frivolous civil rights lawsuits. No litigant should be permitted to abuse the federal courts or opposing parties or counsel simply because his action is brought pursuant to a statute passed to achieve an important societal goal. "Racial or religious discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious." *Carrion v. Yeshiva University*, 535 F.2d 722, 728 (2nd Cir. 1976). Failure to have mechanisms to rein in unreasonable and baseless civil rights litigation will have the result of chilling governmental officials from carrying out their duties with vigor. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

There is no conflict within the circuits on the claim that Civil Rights litigators need not adhere to the same standards as other litigants. There is no pressing need for such an absurd rule. Accordingly, this claim suggests no basis for certiorari review.

Likewise, the argument that Rule 11 violates the Rules Enabling Act, 28 U.S.C. § 2072, when applied to the attorney's fees provisions of the Civil Rights Act provides no basis for a certiorari grant. The argument that Rule 11 authorizes fee shifting in a manner not approved by Congress has already been decided by this Court.

Justice O'Connor, writing for the Court in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, ___, 111 S.Ct. 922, ___ (1991) rejected such an assertion out of hand:

> Rule 11 sanctions do not constitute the kind of fee shifting at issue in *Alyesha* [a civil rights case where the losing party - a plaintiff - was taxed with costs]. Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded. Nor do sanctions shift the entire costs of litigation; they shift only the cost of a discrete event. Finally, the Rule calls only for "an appropriate sanction" - attorneys fees are not mandates. As we explained in *Cooter and Gell*: "Rule 11 is not a fee-shifting statute . . . ."

Thus, this Court has affirmatively rejected the claim that Rule 11 violates the Rules Enabling Act. Moreover, even assuming this issue was still viable, this case is not presently in a posture ripe for review of this issue. The district court gave the state and county defendants full attorneys fees. However, the Fourth Circuit Court of Appeals vacated the sanctions award and has ordered the matter remanded to the district court for redetermination of sanctions in compliance with standards which affirmatively require the sanction not simply be a fee shifting but rather the least sanction necessary to deter. Obviously, the sanction would have some bearing on whether an argument could be credibly made that the Rule 11 sanction was an improper fee shifting mechanism. Thus, this issue is neither ripe for review nor certiorari worthy given this Court's recent decision in *Business Guides, Inc.*

In summary, the nature of the underlying proceeding in this Rule 11 matter -- a civil rights case -- does not bear on the validity of applying Rule 11 sanctions for attorney misconduct. The assertion that litigants under the Civil Rights Act should be immune from the requirements of Rule 11 does not present a credible, much less certiorari worthy, issue.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING COUNSEL. THE COURT OF APPEALS PROPERLY UPHELD THE FINDING THAT SANCTIONED COUNSEL VIOLATED ALL THREE PRONGS OF RULE 11. MERE APPLICATIONS OF FACTS TO LAW AS PRESENT IN THIS ARGUMENT DO NOT PRESENT A CERTIORARI WORTHY ISSUE.

Petitioners Pitts and Nakell, dissatisfied with the findings of the district court and the determination on appeal by the Fourth Circuit Court of Appeals, now request this Court grant certiorari to review once more the material in this case. However, certiorari review surely is appropriate only for issues more important than applying this Court's prior precedent to an unremarkable but extremely voluminous set of materials. This Court ought not grant certiorari for a justification no greater than that Petitioners are dissatisfied with: 1) what a district court judge believed was sanctionable conduct; 2) what three appellate court judges thought were blatant Rule 11 violations from the record after a full review which included not just the pre-argument briefs but also massive post-argument *pro se* filings by Petitioners Nakell and Pitts and; 3) what the other sitting judges on the Fourth Circuit determined needed no further review *en banc*. Indeed. the determination of the district court and affirmance by the Fourth Circuit Court of Appeals are in complete harmony with what the hearing court on the extradition matter in New York found concerning the substance of these Petitioners' lawsuit.

In *Cooter and Gell v. Hartmarx Corp.*,___U.S.___,____, 110 S.Ct. 2447, 2459 (1990), this Court, in no uncertain terms, announced that "Familiar with the issues and the litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." Here the district court made its findings and the Fourth Circuit Court of Appeals correctly applied the abuse of discretion standard of review in the matter. Despite this correct review by the Fourth Circuit Court of Appeals, Petitioners, reciting a highly selective rendition of the events, demand that this Court issue its writ to review anew facts and law. For this Court now to engage in this type of fact specific sifting of the record below as requested by Petitioners would eviscerate the holding in *Cooter and Gell* which mandates deference to district courts on factual and legal findings in Rule 11 matters.

More importantly, the record fully justifies every finding and conclusion upheld by the Fourth Circuit Court of Appeals in this case. The complaint below, as is ably detailed in both lower court opinions, stands deficient on a number of grounds. For instance, the initial and amended complaint (filed some forty-four (44) days later) both requested relief in the form of Temporary Restraining Orders as to a number of issues. However, neither complaint was verified nor were affidavits filed with the complaint suggesting a pressing need for the TRO relief requested. This Court, in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S.Ct. 922 (1991), noted that such verification is mandatory when an application for a TRO is made. Thus, this error on the face of the original and amended complaint shows an egregious violation of Rule 11. This error was magnified when counsel stated in a motion that they needed discovery so that they would be in a position to support their request for a TRO.

The Petitioners also complain that the Fourth Circuit Court of Appeals improperly affirmed the finding by the district court that there was no plausible double jeopardy claim, no plausible exception to abstention doctrines, and no showing pursuant to *Laird v. Tatum*, 408 U.S. 1 (1972) of First Amendment violations. They likewise assert the Fourth Circuit Court of Appeals and the district court wrongly emphasized the significance of the "no state prosecution agreement" claim and ignored the "smoking guns" which showed a Sixth Amendment violation as well as ignoring a First Amendment claim against the county defendants. These complaints do not justify this Court's exercising its certiorari review.

The double jeopardy claim was not plausible on the facts as known to the defendants at the time the complaint was filed and especially when the amended one was filed. There was no evidence of either significant state control of the federal prosecution on the hostage statute or significant federal control of the state kidnapping prosecutions. This Court's unbroken line of authority starting with *Bartkus v. Illinois*, 359 U.S. 121 (1959) and ending with *Heath v. Alabama*, 474 U.S. 82 (1985) precludes any plausible claim of double jeopardy. Even in their certiorari request Petitioners have failed to identify any precedent which would permit, under the facts here present, a basis for making a double jeopardy challenge plausibly.

Likewise, they failed to show that anyone had the requisite injury to show a violation pursuant to *Allee v. Medrano*, 416 U.S. 802 (1974). The affidavits submitted failed to show any of the concrete injuries required to show a First Amendment violation. The basis for avoiding the abstention doctrine was no better based. The Petitioners cited *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988) as their basis for requesting relief clearly prohibited by *Younger v. Harris*, 401 U.S. 37 (1971). However, they cited no concrete facts from which they could reasonably argue that even under the expanded version of "bad faith" espoused by the Eighth Circuit they had a plausible claim that the prosecution arose in retaliation for this post federal trial activity.

Petitioners argue that the Fourth Circuit Court of Appeals and the district court distorted their allegation the State was prosecuting Jacobs and Hatcher in violation of a "no state prosecution" agreement by stating it was central to their claims. However, they do not deny that they made such an allegation in both the original and amended complaints. They likewise present no facts known to them when the action was filed which justify that accusation. In fact, in the face of affidavits from all relevant officials specifically denying the existence of any such agreement, they present no affidavit from Hatcher, who negotiated the claimed agreement, stating that such existed or that he even believed such agreement existed.

Petitioners quibble with the courts both at the district and Fourth Circuit Court of Appeals level finding the claim that Hatcher's Fifth Amendment rights were violated when the State Defendants tried to get Jacobs to cooperate and testify. Petitioner Nakell states the allegation was obviously a mistake. The language of the claim, as pleaded, permits no finding of mistake. It was crafted to allege a violation of the Fifth Amendment. Surely, counsel would have caught such a mistake when they edited the complaint, if it was, in fact, a mistake as opposed to a claim without foundation in law and fact. The designation of State officials as county officials to aid in Petitioners' attempt to allege liability on the part of the county likewise cannot be considered an insignificant error. The North Carolina General Statutes plainly provide otherwise, and Mr. Nakell, as a professor at a prestigious law school, knew better. (App 141a, 143a) In short, every finding by the circuit court as to the legal and factual inadequacies of the complaint appears well based in the

record. Neither the district court nor the court of appeals abused its discretion by making these findings.

Petitioners' allegation that the bias of the lower courts is revealed by the failure to make findings concerning the Sixth Amendment claim against certain State Defendants and the county Defendants merits no review. Indeed, review concerning these claims at this time would be premature.

The Fourth Circuit Court of Appeals vacated the sanctions award against these Petitioners. In so doing, it directed the district court, in redetermining the sanctions, that "[a]ttorney time which is attributed to responding to the media, or to claims within a pleading which do not merit sanctions, should be excluded from consideration. Only attorney time which is in response to that which has been sanctioned should be evaluated." *In Re Kunstler*, 914 F.2d 505,523 (1990). Thus, until the district court recalculates the sanctions, there is no basis for stating the court ignored the Sixth Amendment or First Amendment claims now raised; found them sanctionable; or simply found the particular allegations did raise a plausible claim and, thus, warranted no discussion in an order explaining attorney error. This Court ought not grant certiorari in the face of such uncertainty.

However, even assuming these issues raised by Petitioners were ripe for review, they fail to show an abuse of discretion by the district court in setting sanctions or in the Fourth Circuit Court of Appeals in upholding them. The "smoking gun" allegations of Sixth Amendment interference lose much of their flavor in the cold light of reality.

Christic Institute Attorney Lewis Pitts represented Timothy Jacobs in the federal trial. Mr. Pitts is licensed to practice in South Carolina, but not North Carolina. After the federal acquittal, the State of North Carolina did further investigation and then indicted Jacobs and Hatcher for kidnapping. As soon as he was indicted, Jacobs fled the jurisdiction and was apprehended in New York. The State of North Carolina began extradition hearings. Mr. Pitts represented Jacobs at the extradition hearing. However, he made no attempt to enter an appearance in the North Carolina Courts either by requesting *pro haec vice* status or by filing a notice of appearance as required pursuant to N.C. Gen. Stat. § 15A-141 *et seq*. The presiding judge in Robeson County for that six month term, the Honorable Anthony

Brannon, wrote both Mr. Pitts and Mr. Nakell as former lawyers for Jacobs and Hatcher, respectively. Judge Brannon asked the status of counsels' representation and requested the lawyers communicate to Hatcher and Jacobs that the court would appoint them lawyers if necessary. Mr. Pitts, in the face of this inquiry, stated only that he represented Jacobs in New York. Thus, at the time Eleanor Jacobs lured State Bureau of Investigation Special Agent James Bowman into making the taped comments, Jacobs, to the best of the State's knowledge, was unrepresented. Considering the barrage of inquiries by different lawyers and "community leaders" directed at the State in attempts to negotiate for Jacobs, no inference that Pitts probably would represent Jacobs in state court should have been drawn by the agent. The agent contacted the family only after Jacobs had stated in a news interview that Hatcher had ruined his life and that he, Jacobs, was distressed over what had happened. Thus, the subsequent conversation cannot be viewed as an outrageous attempt to interfere with a Sixth Amendment right since there was no attorney in the State case with whom to interfere. The tape did not show Bowman criticized the lawyers by name or indeed criticized attorneys at all. His only mention of local lawyers was to give Mrs. Jacobs someone with whom she could confirm his own trustworthiness. The only promise Bowman made to Mrs. Jacobs was that he would insure that Jacobs was not housed in the county jail and that if he came back to North Carolina voluntarily he would attempt to get Jacobs a low or unsecured bond. The conversation with Mrs. Jacobs likewise cannot be viewed as an attempt to split the joint defense. Jacobs had already publicly disavowed Hatcher so the claim that Bowman disrupted the joint defense is plainly untenable.

Likewise, the tape of a conversation between the witness coordinator, Lee Sampson, and Jacobs' grandfather fails to show a Sixth Amendment violation. The first conversation concerning Timothy Jacobs' liability in state court was initiated by the grandfather, who is a relative of Mr. Sampson. The taped conversation in late December between the grandfather and the witness coordinator clearly shows each area of conversation was introduced by the grandfather. Sampson was asked his opinion about the Christic Institute attorneys. He gave it. The Petitioners now complain about what Sampson said as violative of Jacobs' Sixth Amendment rights. However, they caused the question to be asked. The honest reply to a

relative was not a Sixth Amendment violation, it was the exercise of a First Amendment right.

The further allegation that the conduct of Sampson and Bowman were orchestrated by the District Attorney was completely unbased in fact. The basis for making the allegation, according to Petitioners, was that the two men's statements sounded sufficiently similar that one could infer they must be coordinating their responses and that they were working with the District Attorney. That is an insufficient basis to accuse the District Attorney of such conduct. They also accused the present District Attorney, Townsend, of such behavior even though they were told by Indian activist Connee Brayboy prior to filing the complaint that Townsend refused to get involved with the question of who was representing Jacobs and that he would work with anyone. Thus, the Sixth Amendment claim by Petitioners is hardly substantial and certainly provides no basis to conclude that the Fourth Circuit Court of Appeals or district court distorted the record in this matter in finding the complaint violated Rule 11.

Likewise the first amendment claim as to the county reveals no basis for finding the Fourth Circuit Court of Appeals acted improperly in its review of the district court's decision. The allegations concerning the Sheriff's alleged failure to provide security at basketball games due to the high school's permitting the Robeson Defense Committee to meet there fails factually. Minimal inquiry would have revealed that Sheriff Stone did not provide security for basketball games. Rather, the school board contracted with off-duty officers on a private basis. Minimal investigation would have revealed the private, as opposed to public, nature of the security arrangements and would have revealed that the Sheriff did not involve himself in coordinating these activities by his deputies. The only time that the security was unavailable was when a meeting at the Sheriff's office ran late so that the officers could not be present at the game. Thus, the First Amendment violation, allegedly egregious in nature and ignored by the lower federal courts, proves to be much less.

The improper purpose finding of the complaint is mandated by the nature of the allegations and all the circumstantial evidence surrounding the date and filing of the complaint, the way the litigation was pursued by the Plaintiffs, and the manner in which it was

terminated just before the Plaintiffs' answer was due to be filed. The facts unerringly reveal that the central purpose of the litigation was not to vindicate rights in court.

In summary, despite the fact specific claims of the Petitioners, the record reveals a clear basis for the district court's finding that the complaint lacked a reasonable basis in law and fact and was filed for an improper purpose. No reason exists for this Court to grant further review of what is nothing but a demand that the competing contentions once more be subjected to analysis. In *Cooter and Gell* this Court indicated that was the job for the district court. This case provides no basis for this Court to retreat from that wise allocation of judicial resources.

III. NOTHING IN RULE 41(A)(2) PROHIBITS A DISTRICT COURT'S CONSIDERATION OF A RULE 11 MOTION FOR SANCTIONS FOLLOWING A RULE 41(A)(2) DISMISSAL. THE COURT OF APPEALS' HOLDING COMPORTS WITH THE PRIOR DECISIONS OF THIS COURT AS WELL AS THE EXPRESSED PURPOSE OF BOTH RULE 11 AND RULE 41. NO CONFLICT EXISTS AMONG THE CIRCUITS.

Petitioners Kunstler and Nakell seek certiorari to review the circuit court's determination that a Rule 41(a)(2) dismissal presents no bar to a subsequent Rule 11 motion for sanctions and that the district court may entertain such motion following dismissal of the action without prior notice to the sanctioned counsel. Petitioners assert a conflict among the circuits as well as a fundamental unfairness to the plaintiff " . . . who would otherwise be trapped into a dismissal upon conditions that he did not contemplate when he filed his motion." Kunstler petition, at 9. In an attempt to support their assertions, petitioners misstate the facts of this case, misrepresent the holdings of the circuit courts, and ignore this Court's fundamental teachings in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447 (1990). Petitioners here present no issue justifying issuance of the writ.

Petitioner Kunstler asserts that Respondents stipulated to a dismissal of the underlying action without reservation of the right to file a Rule 11 motion and, thus, stand barred. Petitioner Nakell asserts that Respondents consented to a voluntary dismissal with prejudice without notifying Petitioners of their intent to file a Rule 11 motion.

The court of appeals found that Respondents neither stipulated nor consented to a dismissal, but did authorize Petitioners to assert that Respondents did not oppose a motion for leave to dismiss pursuant to Rule 41(a)(2). *In Re Kunstler*, 914 F.2d 505, 512 (4th Cir. 1990). As the appeals court noted, Mr. Nakell telephoned Ms. Byers on 20 April 1989 seeking these Respondents' approval to a stipulated dismissal pursuant to Rule 41 (a)(1)(ii). Counsel refused, but authorized Mr. Nakell to represent that Respondents would not oppose a motion for leave to dismiss pursuant to Rule 41(a)(2). The transcript of that telephone conversation (App 123a-125a), the motion for leave to file voluntary dismissal (App 135a) and the dismissal order (App 137a) plainly support the holdings of both the district court and the circuit court.

Petitioners Kunstler and Nakell assert that circuit court decisions in the Second, Third and Ninth Circuits conflict with the Fourth Circuit holding here, and provide that a litigant must reserve the right to file a Rule 11 motion as part of the terms and conditions of a Rule 41(a)(2) dismissal. Such is not the rule, and petitioners cite no case so holding.

Barr Laboratories, Inc. v. Abbott Laboratories, 867 F.2d 743, 747 (2nd Cir. 1989) involved a negotiated stipulated dismissal signed by both parties pursuant to Rule 41(a)(1)(ii). Prior to the dismissal, defendant's counsel, in a letter, implied that they would not seek sanctions if the plaintiff promptly dismissed the action. Plaintiff did so, and the stipulation included no provision for sanctions. Subsequently, the plaintiff initiated a virtually identical action in another jurisdiction, and the defendant followed with the contested Rule 11 motion. The court wrote "While we are not prepared to say that a district court is totally without authority to impose sanctions after a stipulated dismissal, we hold that Abbott's application properly was denied under the circumstances presented here." *Id.* at 744. The Second Circuit ruled that the district court lacks jurisdiction to impose a Rule 11 sanction following a stipulated dismissal signed by all parties pursuant to Fed.R.Civ.Proc. 41(a)(1)(ii) without a reservation of the right in the stipulation to move for such relief. *Id.* at 748. The court noted that other circuits routinely imposed sanctions following such dismissal. *Colombrito v. Kelly*, 764 F.2d 122 (2nd Cir. 1985), involved a stipulated dismissal pursuant to Rule 41(a)(2) followed by

a motion for attorney's fees pursuant to 42 U.S.C. § 1988. The court noted that, absent statutory authority, the American rule precludes the award of attorney fees following a dismissal with prejudice and nothing in Rule 41(a)(2) authorizes such an award. *Colombrito v. Kelly*, 764 F.2d at 134-35. The *Colombrito* court never discusses Rule 11. Since Rule 11 is not a fee shifting mechanism, *Colombrito* provides not even arguable authority for petitioners' views. See *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S.Ct. 456 (1989). Thus, no Second Circuit case discusses the availability of a Rule 11 motion following a Rule 41(a)(2) dismissal with prejudice.

In *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3rd Cir. 1988), the Third Circuit adopted a supervisory rule dismissing Rule 11 motions filed after the entry of final judgment. The Fourth Circuit adopted no such supervisory rule, but early on held such considerations equitable in nature. *See, Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165, 1167 (4th Cir. 1986). Such view appears consistent with this Court's holding in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2455-57. None of the Third Circuit cases conflict with the decision here.

Unioil Inc. v. E.F. Hutton & Co. Inc., 809 F.2d 548 (9th Cir. 1986), *cert. den.* 484 U.S. 822 (1987), concerned plaintiffs' attempted appeal from a district court order granting their requested Rule 41(a)(2) voluntary dismissal without prejudice but upon condition that they reimburse the defendants' expenses and attorney fees. Nothing in the opinion suggests that a Rule 11 motion constitutes a mandatory term or condition of a Rule 41(a)(2) dismissal which an aggrieved defendant must negotiate as part of a dismissal. *Lau v. Glendora Unified School Dist.*, 792 F.2d 929 (9th Cir. 1986) held that a plaintiff possesses a reasonable time to accept or refuse a voluntary dismissal pursuant to Rule 41(a)(2) upon which the district court engrafted a term or condition that the plaintiff pay some or all of the defendant's attorney fees. Again, nothing in the case suggests that a Rule 11 motion constitutes a term or condition of such dismissal. Petitioners demonstrate no conflict with Ninth Circuit decisions.

Petitioners also complain that the circuit court ignored Respondents' obligation to notify petitioners of the the perceived Rule 11 violation immediately upon discovery. Petitioners cite *Thomas v.*

Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc) in support of the proposition that failure to give prompt notice bars the sanctions motion. In *Thomas*, 836 F.2d at 879, the Fifth Circuit noted that the failure to give prompt notice to the offending party and the court should be considered as a violation of counsels' obligation to mitigate damages caused by the Rule 11 violation, and the district court should reduce the fee award accordingly. Later, the court noted that the format to be followed depends upon the circumstances. *Thomas*, 836 F.2d at 881. The *Thomas* court reasoned that the early notice provision gives the offender the opportunity to cease and desist in his conduct rather than proceeding through a complete trial and then facing a sanctions award for the accumulated bad conduct. *Thomas* nowhere absolutely bars a sanctions motion after a particular period of time.

The Fourth Circuit adopted a case by case approach in *In Re Kunstler*, 914 F.2d at 513. Citing *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2457, the circuit court noted:

> There may be circumstances under which Rule 11 sanctions should not be granted after the voluntary dismissal of a case, i.e., a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after the dismissal. 'Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be a lengthy delay prior to their imposition.' *Hartmarx Corp.*, 110 S.Ct. at 2457. However, these considerations are equitable, and must be resolved on a case by case analysis.

In Re Kunstler, 914 F.2d at 513. Even the *Thomas* court noted that, in the case of pleadings, the sanctions issue is normally determined at the end of the litigation. *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d at 881. Thus, the Fourth Circuit's view appears consistent with other courts, and consistent with this Court's relegation of timeliness standards to the district courts. *See Cooter & Gell v. Hartmarx Corp.*, ___ U.S. at ___, 110 S.Ct. at 2457.

Ironically, Mr. Kunstler, in his petition, asserts that counsel would have litigated the case had Respondents advised they would seek Rule 11 sanctions following the dismissal. (Kunstler, p 13) In light of the gross Rule 11 violations found in the complaint, earlier notice to sanctioned counsel would have compounded Respondents'

damages rather than mitigated them, and the early notice would have served no purpose as envisioned by the Fifth Circuit. Petitioners' argument that imposition of Rule 11 sanctions without reservation of the right under Rule 41 "blindsided" or ambushed them presents no justification for certiorari, and ignores the fundamental distinction between the attorney conduct regulated by Rule 11 and by Rule 41 which this Court noted in *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. at ___, 110 S.Ct. at 2456-57. While both seek to curb litigation abuse, Rule 41 governs a litigant's power to dismiss, while Rule 11 specifically punishes an attorney who initiates a baseless filing - an offense complete at the time the attorney signs and files the paper. The suggestion by amici Civiletti, *et. al.*, that treating a Rule 11 motion as a term or condition of a Rule 41 dismissal promotes the administration of justice asks this Court to revisit *Cooter & Gell v. Hartmarx Corp.* There, this Court noted that:

> If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think, and investigate more carefully before serving and filing papers.'. . .

Cooter & Gell v. Hartmarx Corp., ___ U.S. at ___, 110 S.Ct. at 2457. Indeed, Mr. Kunstler's candid admission that counsel would not have dismissed the case had they known of the impending Rule 11 motion demonstrates the propriety of this view. Petitioners and amici seek to hold civil defendants hostage to serve as legal shields from Rule 11 liability. Adoption of this approach would place a defendant's counsel in a conflict between his loyalty and obligation to act in his client's best interest (early resolution of the litigation), and his duty as an officer of the court to note and deter baseless litigation.

Nothing in these petitions justifies review by this Court. The Fourth Circuit correctly determined the issues consistent with this Court's prior opinions. Petitioners demonstrate no present conflict among the circuits and present no justification to revisit *Cooter & Gell.*

IV. THE DISTRICT COURT'S PROCEDURES COMPORT FULLY WITH THE REQUIREMENTS OF DUE PROCESS AND RULE 56. THE PETITIONERS RECEIVED ALL THE PROCESS DUE THEM. PETITIONERS MAKE NO SHOWING TO JUSTIFY THE ISSUANCE OF THIS COURT'S WRIT OF CERTIORARI IN THIS MATTER.

Petitioners Kunstler and Nakell seek certiorari to review the district court procedures afforded them in the Rule 11 process. Petitioners contend that they stood entitled to an evidentiary hearing. A review of the record here indicates that Petitioners received all the process due them under these circumstances. These proceedings merit no review by this Court.

Petitioners acknowledge that the Advisory Committee Note states that "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be needed." Petitioners also concede that due process does not mandate an evidentiary hearing. Petitioners assert, however, that Judge Howard possessed no prior knowledge of the case and, therefore, should have conducted an evidentiary hearing. The record before this Court belies that assertion.

The record here indicates that Judge Howard received the case upon Petitioners' filing the original complaint on 31 January 1989. Judge Howard considered an initial Rule 11 motion; a motion for a protective order and response in opposition both accompanied by substantial briefs and exhibits; a first amended complaint; lengthy Rule 12 motions and briefs from from both State and county Defendants, with the State Defendants' motion accompanied by extensive affidavits and exhibits; a Rule 11 motion from the Defendants, again accompanied by affidavits and exhibits; a Rule 11 response from the Petitioners which included a lengthy brief as well as affidavits and exhibits; a Rule 11 reply brief, affidavits and exhibits from the Respondents; and a counter Rule 11 motion, with a brief and exhibits from the Petitioners, which the district court also considered as additional material in opposition to Respondents' Rule 11 motion. Additionally, the district judge heard oral argument concerning Respondents' Rule 11 motion. Petitioners point to no evidence which Petitioners wished the district judge to consider but which Petitioners could not present because of the procedures utilized. Thus, the record

indicates the district judge participated in the case from its inception, possessed full knowledge of the relevant facts, and considered all evidence which the petitioners wished him to view. Under these circumstances, Petitioners demonstrate no procedural deficiencies.

Petitioners' claims concerning the necessity of an evidentiary hearing to determine the propriety of their requests for injunctive relief merit no review by this Court. Petitioners admitted that, at the time of filing, they possessed no basis for the request. (App 133a) Rule 65(b) plainly requires a litigant to possess and set forth the factual basis for a temporary restraining order with the request for such extraordinary relief. Petitioners failed in their obligations, and their conduct merits sanction. See *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S.Ct. 922 (1991).

Petitioners cite numerous areas of purportedly contested issues related to their basis in law and fact for the complaint, and assert that the summary judgment provisions of Rule 56 preclude summary judgment as to these issues. While they concede that this Court must mold Rule 56 before applying it to a Rule 11 proceeding, Petitioners argue that the rule's treatment of contested factual issues should apply to a Rule 11 proceeding. This argument merits no review.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court held that the explicit language of Rule 56(c) requires the court to determine a motion for summary judgment in terms of the substantive law governing the case. This Court noted:

> ... Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of <u>some</u> alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no <u>genuine</u> issue of <u>material</u> fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts

> that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment....

Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-248. Nothing Petitioners filed with either court indicates a genuine and material factual dispute as to their basis in law and fact for the requested temporary restraining order and subsequent injunctive relief. The identical analysis applies to their alleged "no state prosecution agreement" as well as the other sanctioned claims.

As Mr. Kunstler's petition before this Court demonstrates, Petitioners still do not understand that Rule 11 mandates counsel possess a basis in law and fact for a complaint at the time counsel signs the document, not at some later date. Their argument that they could demonstrate the validity of their position by discovery and an evidentiary hearing ignores this basic mandate. Kunstler, p 18. Indeed, their assertions before this Court constitute an admission that, at filing, Petitioners possessed no basis in law and fact for their allegations.

Petitioners contend that the circuit court acknowledged the necessity of an evidentiary hearing in this matter to resolve questions related to Petitioners' improper purpose. Petitioner Kunstler quotes the circuit court as noting:

> The number of credibility findings which the Court made without an evidentiary hearing should have suggested to the Court that an evidentiary hearing would have been of value.

Kunstler Petition, at 17. The circuit court's complete holding reads:

> Even if an evidentiary hearing is not required in every "improper purpose" case, appellants argue that such hearing was required in this case. Although the number of credibility determinations which the court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.

In Re Kunstler, 914 F.2d at 522. As the circuit court opinion implies, this is not a close case. The record contains plenary evidence that

Petitioners violated all three prongs of Rule 11, even excluding those points which their filings contest.

Petitioner Kunstler asserts that the Third Circuit's holding in *Jones v. Pittsburgh National Corp.*, 899 F.2d 1350 (3rd Cir. 1990) conflicts with the Fourth Circuit's views here. Such is not the case. The Third Circuit commended to the district judges' discretion the determination of the procedural course to pursue in a Rule 11 sanctions action on a case by case basis. The Fourth Circuit adopted precisely this approach. *In Re Kunstler*, 914 F.2d at 521-22. Thus, the two circuits appear in complete harmony with their approach to this issue.

Finally, and most regrettably, Petitioner Nakell asserts that the proceedings deprived him of his good name without adequate process. In protesting the purportedly severe injury to his reputation, he quotes from Shakespeare's Othello. Nakell at 61-63. This quotation appears significant far beyond Mr. Nakell s intent. The character, Iago, speaks so protectively of his reputation, yet he destroyed two other characters with lies and innuendo. By signing and filing this baseless complaint, Petitioners, like Shakespeare's Iago, placed the reputation of others in severe jeopardy by lies and innuendo. Mr. Nakell obviously cared little for the lives and reputations of numerous state and county officials, for he initiated this litigation, as both the district court and the circuit court overwhelmingly found, without an adequate basis in law or fact and for a plainly improper purpose. The injury to Mr. Nakell's reputation from his sanctionable conduct creates no issue worthy of certiorari. Mr. Nakell should look for relief by altering his own conduct, not by attacking the conduct of the district and circuit judges who heard and determined these issues.

CONCLUSION

Petitioners in this matter demonstrate no issue worthy of certiorari review. Mr. Pitts, Mr. Kunstler, and Mr. Nakell demonstrate no violation of their due process guarantees in the application of Rule 11 to them. The district and circuit courts properly analyzed the issues presented, consistent with this Court's prior mandates concerning Rule 11. The circuit court opinion correctly applied the law and the facts to this case. Petitioners demonstrate no justification for revisita-

tion of this Court's prior decisions in this area. Petitioners make no showing of conflicts among the circuits nor do they suggest a pressing, unresolved issue. At best, these petitioners request this Court act as a Court of Error Review. This is not the function of this Court. The petitions for writ of certiorari should be denied.

Respectfully submitted this the 25th day of March, 1991.

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APPENDIX

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AFFIDAVIT OF PHILLIP J. KIRK, JR.
DATED MARCH 23, 1989

[caption omitted]

The undersigned, first being duly sworn, deposes and says:

My name is Phillip J. Kirk, Jr. and I serve as Chief of Staff for Governor James G. Martin, Jr. In that capacity on February 1, 1988, I negotiated by telephone with John Edward Clark aka Eddie Hatcher on the Governor's behalf for the release of the persons he and Timothy Bryan Jacobs were holding hostage at shotgun point. In engaging in these negotiations, I had sole contact with Eddie Hatcher on behalf of the Governor of North Carolina. I have attached transcripts of my telephone conversations with Hatcher to this affidavit as Exhibit 1. I consulted with the Governor, the Governor's General Counsel, James Trotter, and the Secretary of Crime Control and Public Safety, Joseph Dean in handling the negotiations. I did not consult with Attorney General Lacy H. Thornburg or District Attorney Joe Freeman Britt. The entire agreement I reached with Eddie Hatcher is contained in the Memorandum of Agreement I signed and had delivered to Hatcher. I am attaching a copy of that agreement to this affidavit as Exhibit 2.

I never agreed on behalf of the Governor that Eddie Hatcher or Timothy Jacobs would be tried only in Federal Court. The issue of in which jurisdictions would try Hatcher and Jacobs was never mentioned during the negotiation. I only agreed on behalf of the Governor that Jacobs and Hatcher could surrender to Federal authorities. I recognize now and knew then the Governor has no authority to bind either the Federal Government or the State of North Carolina to prosecute or decline to prosecute an individual. In order even to agree that Hatcher and Jacobs could surrender to Federal authorities, I had to contact Federal authorities to ascertain if they would accept custody of Hatcher and Jacobs. The extent of my contact with the Federal authorities was to determine if they would accept custody, not if they would prosecute.

In early October, 1988, I received a copy of a letter addressed to Joe Freeman Britt from Barry Nakell and Lewis Pitts claiming the Governor had agreed with Hatcher that he and Timothy Jacobs would only be tried in Federal Court. I recalled no such agreement

and made a notation to that effect on my copy of the letter, attached to this affidavit as Exhibit 3.

Thereafter, prior to the filing of this lawsuit, I met with Barry Nakell and P. Lewis Pitts, Jr. At that meeting I told them there had been no agreement made on behalf of the Governor that Hatcher and Jacobs would be tried only in Federal Court or not tried in State Court and to my knowledge, the Governor made no such agreement. This meeting occurred on October 28, 1988.

This the 23rd day of March, 1989.

[signature and notary block omitted]

EXHIBIT 1 TO AFFIDAVIT OF PHILLIP J. KIRK, JR. DATED MARCH 23, 1989

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 2/18/88

Sergeant M. E. REYNOLDS, North Carolina Highway Patrol, Raleigh, North Carolina, provided an audio cassette which he stated is a copy of original recordings made of telephone conversations between EDDIE HATCHER and PHIL KIRK.

These conversations were consensually monitored and recorded at the North Carolina Highway Patrol Headquarters in Raleigh, North Carolina, on February 1, 1988, during a hostage situation.

Transcripts of the conversations are attached.

Investigation on 2/18/88 at Raleigh, N.C. File CE 7-2169 by SA THOMAS B. MC NALLY/lbi Date dictated 2/18/88

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency. It and its contents are not to be distributed outside your agency.

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TRANSCRIPT ATTACHED TO EXHIBIT 1 OF AFFIDAVIT OF PHILLIP J. KIRK, JR. DATED MARCH 23, 1989

UNKNOWN FEMALE: Robesonian.

KIRK: This is the Governor's Office calling. May I please speak to Mr. Hatcher?

UNKNOWN FEMALE: Yes. Please hold just a minute.

HATCHER: Yea.

KIRK: Mr. Hatcher?

HATCHER: Uh-huh.

KIRK: This is Phil Kirk. I'm Governor Martin's Chief of Staff.

HATCHER: Well, where's Governor Martin?

KIRK: He is, ah, will be available later. He's not here right now.

HATCHER: Uh-huh.

KIRK: Would you, ah . . .

HATCHER: Okay, would you hold on a minute. I want you to talk to somebody.

(Pause)

HATCHER: Hold on.

KIRK: Mr. Hatcher.

(Conversation Ends)

(New Conversation)

KIRK: This is the Governor's Office calling for Mike.

UNKNOWN FEMALE: Okay, hold on just a minute.

KIRK: Thank you.

MIKE: Hello.

KIRK: Mike?

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MIKE: Yes.

KIRK: This is Phil Kirk. I'm Governor Martin's Chief of Staff.

MIKE: Right.

KIRK: Ah, I am in a position to speak for the Governor, and I wish you could talk, ah, Mr. Hatcher into at least, ah, talking with me for three minutes.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

MIKE: Sir . . .

KIRK: Ah, yes sir.

MIKE: . . . sir, let me explain something real quick. Okay? Ah, we're looking down the business end of a double barrel shotgun that's been sawed off. The police have ignored Eddie Hatcher's instructions. They cleared the street for a siege, they've got a Swat Team out there. They got some very, this is a very tense situation.

KIRK: Yes sir.

MIKE: We're putting people in the doorways to block bullets. If anybody gets killed in here, it's gone be from law enforcement bullets.

KIRK: Right.

MIKE: Do you understand?

KIRK: Yes sir, and we have that under . . .

MIKE: Now we can, none of us . . .

KIRK: . . . we have that under control.

MIKE: . . . none of us down here can understand why Governor Martin himself won't talk to him. And that's the problem, you know, let me see, let me talk, I don't think people are aware of what he's asking. He's not asking for, ah, let somebody out of jail or money or even safe passage. He's not asking for anything. He's willing to turn himself in. All he wants is for an agency outside the State of North Carolina to come and look at the situation. That's all he's asking.

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KIRK: And I agree with that. I was gone be able to tell him that, that's what I wanted to tell him.

MIKE: Well . . .

KIRK: That I could even do that.

MIKE: Well just, I see, he is very distrustful of, of people within the government, particularly the, the State Bureau of Investigation, some people in the Attorney General's Office (unintelligible).

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

KIRK: I understand that, but I'm his Chief of Staff and I don't have any connection with the SBI or the Attorney General's Office.

MIKE: Can you tell me why Governor Martin himself won't call.

KIRK: I haven't been able to get him yet. I will be able to if necessary, but I haven't been able to yet.

MIKE: Sir, ah, I cannot overemphasize (unintelligible).

KIRK: Okay. But he . . .

MIKE: (Unintelligible).

KIRK: . . . would you, would you tell him, would you tell him one thing, that, that I do have the authority to speak for him, and would he be willing to talk to me for three minutes, or two minutes.

MIKE: Just a moment.

(Pause)

MIKE: He wants to know who has the authority to move these, these, ah, law enforcement people away from the building.

KIRK: We have asked the law enforcement people in the last ten minutes to move away from the building.

MIKE: Okay, well, just a moment. (talking to someone in the background)

MIKE: Okay, he said if a shot comes in this office,

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better make sure it gets both of 'em at the same time.

KIRK: Both of whom? There, there not going to be any shots fired into the building as long as we're talking especially.

MIKE: Okay. He's gonna line us up at the doors. Okay, he's on the other line right now.

KIRK: Yes sir.

(Pause)

MIKE: He's still on the line, I'm gone get him on here just as soon as I can.

KIRK: Okay. Thank you.

(Pause)

HATCHER: Yes.

KIRK: I just wanted to, to tell you that I am sitting in Raleigh with the Governor's General Counsel, whose his top Legal Counselor. I'm sitting with the Governor's Secretary of Crime Control and Public Safety and he was appointed by Governor Martin. In other words, we're the three top aids for Governor Martin.

HATCHER: Okay, okay.

KIRK: Okay, but let me, I'm gone listen to you, and I would appreciate very much . . .

HATCHER: Okay.

KIRK: . . . your listening to me.

HATCHER: Well you have to understand this is a very tense situation.

KIRK: I know it's a very tense situation, and I wanted to say to you that I know you have some very real concerns and some very serious concerns. And I want to build up a communciation relationship that you and I can talk, and I, there will not be any shots fired. I can tell you that.

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HATCHER: Give me your word of that . . .

KIRK: You have my word.

HATCHER: . . . because like I said, I'm not, I'm not wanting to hurt nobody, ah, but once they start, I have no alternatives.

KIRK: Mr. Hatcher. I don't have many things, but my word is something . . .

HATCHER: Okay.

KIRK: . . . is something that you can take.

HATCHER: Okay.

KIRK: And I give you my word that there are not gonna be any shots fired . . .

HATCHER: Okay.

KIRK: . . . when you and I are talking. That would be foolish.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: I'm not talking about when me and you are talking . . .

KIRK: Okay, there will . . .

HATCHER: . . . I'm talking later on.

KIRK: . . . there will not be any shots fired, ah, later on either. And I'm not gonna talk very long. I'm gonna mention a few things to you, and then I'm gonna be quiet, and I'm gone listen . . .

HATCHER: Okay.

KIRK: . . . to you because it's very important that we listen to each other.

HATCHER: That's right.

KIRK: And it's very important that we trust each other even though I've never met you and you've never met me.

HATCHER: Okay.

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KIRK: Okay. You with me so far?

HATCHER: Yes.

KIRK: I know you're under a tremendous amount of pressure too.

HATCHER: Uh-huh.

KIRK: Okay? Now here's what I want to say to you, and let me review that I am, I'm with the Governor's Legal Counsel who knows about things that I don't know about. I'm with the Secretary of Crime Control and Public Safety who is appointed by the Governor. We don't have SBI officials or Attorney General's officials, these are Governor Martin's appointees that I am talking about. Now here's the main thing I wanna say to you. As soon as you, and you've got the key to this now.

HATCHER: Uh-huh.

KIRK: As soon as you are able to end this situation, any of the three people I've mentioned, or all three of us, it will be your decision whether you meet with me, whether you meet with the three people that I've

mentioned, as soon as the hostages are released, and as soon as you give yourself up to federal, not state . . .

HATCHER: Okay, that's federal, but . . .

KIRK: . . . federal officials, wait let me finish, and then I'm gone be quiet.

HATCHER: Okay.

KIRK: Any evidence that you have which you've been talking about with the media today, and talking about to other people, any evidence you have will be fully investigated by federal authorities, 'cause if there's any evidence of wrongdoing, the Governor's gone want it corrected, and we'll turn over any evidence that you have, and we'll go with you to turn over any evidence that you have to federal officials, and I'm, to the U.S. Attorney. Now that's U.S., not North Carolina. The U.S. Attorney. Because you've made it very clear that you don't want it turned over to the state. You want it . . .

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HATCHER: I do not . . .

KIRK: . . . turned over to federal. I understand that. Now you don't know me, but I promise you I'll keep my word if you will let the rest of the hostages out, and if you will turn yourself over, I will . . .

HATCHER: I'm not turning myself over to any local officials.

KIRK: No, no, I didn't say to local officials. I said to a federal official.

HATCHER: And I will not go out. I will, they will come in and I will be escorted out with them, unarmed, but I won't walk out there for a shooting mob to blow me down.

KIRK: You have my word that you will not be shot. You have my word that there is not anybody, it will be an FBI not SBI.

HATCHER: Okay.

KIRK: It will be an FBI, but how would an FBI Agent walking into the building know that he was safe.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: Well like you told me to give your, my, your, you gave me your word.

KIRK: Yes sir.

HATCHER: I'll give you my word.

KIRK: Okay, you're going to give me your word . . .

HATCHER: Your word.

KIRK: . . . because your . . .

HATCHER: But look, it ain't Alan Hobbs from here is it? Or Howard Burgin.

KIRK: Give me the names again because I . . .

HATCHER: Alan Hobbs.

KIRK: You will not surrender to Alan Hobbs.

HATCHER: Or, no, I will not surrender to no local FBI Agents. I want somebody from out of the area.

[CE 7-2169 8]

KIRK: No local FBI.

HATCHER: No.

KIRK: Okay. Out of area. Okay. Now, before we . . .

HATCHER: The State Representative Sidney Locks, he's already said, and I do demand that he come in along with them.

KIRK: Okay. You trust Representative Locks . . .

HATCHER: I surely do.

KIRK: . . . well I do too. Okay. Now, we would then, whoever you want from that group, any one of us or all of us would be willing to meet with you after you release the hostages, and after you give yourself up to an outside FBI Agent and Representative Sidney Locks, ah, after you give yourself up, then we will meet with you and get the evidence you have, and if there's any evidence of wrongdoing, the Governor's gone want it corrected. He doesn't want to see anybody mistreated. And we'll turn over any evidence that you have to the U.S. Attorney.

HATCHER: Okay, well I want, I want Sidney Locks to call me when we hang up.

KIRK: You want Sidney Locks . . .

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: I want to talk to Sidney.

KIRK: You want Sidney Locks to call you when we hang up?

HATCHER: Uh-huh.

KIRK: Okay. I will, and it will, it'll be an, the local FBI people will not be doing the investigating. It will be an outside . . .

HATCHER: Okay.

KIRK: . . . FBI. Outside the Federal Bureau of Investigation.

HATCHER: I, I, I'm taking you at your word, now 'cause like I said, if the . . .

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KIRK: Well I . . .

HATCHER: . . . shots are fired, innocent people's gone be killed.

KIRK: . . . I keep my word, and there won't be any shots fired.

HATCHER: Okay, well, well see what you don't understand is we got some trigger happy local law enforcement officers. Somebody better get the word to 'em.

KIRK: Yes sir, well, now I gave you my word . . .

HATCHER: Okay.

KIRK: . . . you gone give me your word?

HATCHER: I, well you get Sidney to call me.

KIRK: Okay. I will get Sidney Locks to call you now. As a show of good faith, would you let a few more hostages out?

HATCHER: I'm down to nine.

KIRK: You're down to nine. How about letting a few more out to show that we're negotiating and talking in good faith.

HATCHER: I been letting 'em go all day, and I been asked the Governor to call me all day, I didn't hear nothing, no hell no, I won't let one of 'em go. I want to hear from Sidney Locks.

KIRK: Okay, you want to hear from Sidney Locks?

HATCHER: Uh-huh.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

KIRK: Okay. I will work that out.

HATCHER: All right. Bye.

KIRK: Thank you. Bye.

(Conversation Ends)

[CE 7-2169 10]

(New Conversation)

UNKNOWN FEMALE: Robesonian.

KIRK: Yes, ah, this is Governor Martin's Office calling Mr. Hatcher.

UNKNOWN FEMALE: Just a minute.

(Pause)

HATCHER: Yea.

KIRK: This is Phil Kirk, Governor Martin's Chief of Staff.

HATCHER: Uh-huh.

KIRK: I've got a, I've talked to Representative Locks, and I've got a document written out in hand that I want to read to you before we have it typed.

HATCHER: Uh-huh.

KIRK: Okay. You ready?

HATCHER: Yea.

KIRK: Agreement, now you stop me anytime you got a question or anytime you want to make a suggestion. Agreement of statement on behalf of Governor James G. Martin, February 1, 1988. It is hereby agreed that in return for the safe release of all hostages, I will guarantee the following: number one: that Eddie Hatcher and Timothy Jacobs will be able to turn themselves over to the custody of Federal Bureau of Investigation Agent Paul Daly from Charlotte, so that they can be safely removed from the building. Number two that John Hunt, presently in custody in the Robeson County Jail, will be transferred to another correction facility away from Robeson County . . .

HATCHER: Not, not, not the Central, 'cause that's where some, most of the people is that he helped bust . .

KIRK: No . . .

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

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HATCHER: . . . I mean, another county jail.

KIRK: . . . sir I didn't say, I didn't say Central Prison.

HATCHER: Okay.

KIRK: Will be transferred to another correctional facility away from Robeson County. If you want us to put in not Central Prison, we'll do that.

HATCHER: Okay.

KIRK: Do you want that in there?

HATCHER: Yea.

KIRK: If he wishes to do so.

HATCHER: Uh-huh.

KIRK: Is that okay?

HATCHER: Yea.

KIRK: Okay. Number three: that a Task Force of my top, of the Governor's top advisors, Chief of Staff Phil Kirk, General Counsel Jim Trotter, Secretary of Crime Control and Public Safety Joe Dean will meet with Mr. Hatcher and Mr. Jacobs and Mr. Hunt as soon as it's safe to do so to review all the allegations and evidence which they have of any crime, that's to cover all the things you're concerned about, see that it is investigated fully and turn it over to the U.S. Attorney for appropriate action. Number four: that the death of Marvin McKellar in the Robeson County Jail will be fully investigated. Per Governor James G. Martin by Phillip J. Kirk, Jr., Chief of Staff. Now what does that not cover that you want covered? And I'll read it again to you if you'd like for me to.

HATCHER: What about the demand that the Governor set up a Special Prosecutive Task Force to investigate the Sheriff's Department, District Attorney's Office and local SBI Agents?

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KIRK: Okay, let me read, yes sir, and if you want that more specific, I'll add . . .

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: I want more specific.

KIRK: . . . okay but now listen to me, so, so you'll know we're not trying to trick you now, 'cause I've got that covered I think in number three, but I will add the language that you just said. Number one, the Governor doesn't have the authority to appoint a Special Prosecutor.

HATCHER: Who does?

KIRK: Ah, the U. S. District Attorney, that's why we said we're gone turn it over to him. So listen to that, would you please, to number three again.

HATCHER: Okay.

KIRK: That a Task Force of my top advisors, Chief of Staff Phil Kirk, that's me, General Counsel, that's the Governor's top lawyer, Jim Trotter, and Secretary Joe Dean of Crime Control and Public Safety, that's his, ah, ah, Cabinet Secretary. He's appointed all three of us. Will meet with Mr. Hatcher and Mr. Jacobs and Mr. Hunt to review all allegations and evidence, you can, you can give us evidence, ah, of something, see if we're not too specific, you, if we name the things, which we don't have to, you might think of something new tomorrow that you wish would have been part of the agreement. If we leave it more open ended, then you can bring in those things that you just said. But if you're insistent on us saying to include the Sheriff's Department . . .

HATCHER: Yes I am.

KIRK: . . . okay . . .

HATCHER: The District Attorney's Office . . .

KIRK: . . . all right, just a minute, just a minute, let's find the right place to put it. To review all the allegations and evidence which they have of any crime, see that it is investigated fully

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and turn it over to the U. S. Attorney General, U. S. Attorney, for appropriate action. The investigation is to include, but not be limited to, that's to protect

you so if you can think of something else tomorrow or the next day, you won't say well that's not the agreement, we'll do it anyway. The investigation is to include, but not be limited to the Sheriff's Department, now what else?

HATCHER: The District, Joe Free, District Attorney Joe Freeman Britt and his office.

KIRK: The District Attorney, is he the District Attorney?

HATCHER: He's the District Attorney, Joe Freeman Britt.

KIRK: The District Attorney's Office. Okay.

HATCHER: And local S, local district SBI Offices.

KIRK: And local and district . . .

HATCHER: SBI Office.

KIRK: . . . SBI Offices. Now I'd prefer to leave this out, but we're gone put it in at your request. Okay? Because I, I prefer to leave it general, but if you're insistent on this, we're gone put it in.

HATCHER: Yea. What about the, ah, well in other words, I, see we can still include in this investigation into the, of, of, of . . .

KIRK: I said it's to include . . .

HATCHER: . . . okay, we can include other things, like Jimmy Earl Cummings' death and Joyce Sinclair's death and these . . .

KIRK: Yea, that's why I put in but, but not be limited, but not be limited to, let me read that again, 'cause I want you to be comfortable with this. The investigation is to include . . .

HATCHER: Okay.

KIRK: . . . comma, but not be limited to, comma, Sheriff's Department, District Attorney's Office, and local and district SBI Offices, because then

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number four says we're gone investigate the death of Marvin McKellar, and see if you, ah, whenever we meet with you, that's your opportunity to bring up all the specifics.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: Okay.

KIRK: And we could do that much better in, in surroundings when things are not as tense as they are right, right now.

HATCHER: Okay. Well now the other thing, another . . .

KIRK: You can say more and I can too.

HATCHER: . . . ah, that's good. What, what you got there, that's meets it to the t, but other things . . .

KIRK: It meets it to the t?

HATCHER: . . . to the t, but I'm not, we're not, me and Timmy, we're not walking out of here.

KIRK: Now listen, I got a deal for that, but that does not go in writing. Let's . . .

HATCHER: Okay.

KIRK: . . . operate on good faith on that, you don't put that (unintelligible).

HATCHER: Okay. Okay, okay . . .

KIRK: The agreement would be that, that Sidney Locks would come in.

HATCHER: Okay, that'd be fine.

KIRK: I, that Sidney Locks, well I may, you gone have to work that out with Sidney probably.

HATCHER: Well, I talked with him, he said if, if y'all get, give him the go head, he would do it. 'Cause I give him my word, we will lay down our arms and go out with Sidney.

KIRK: You would lay down your arms . . .

HATCHER: And go out with Sidney Locks.

KIRK: . . . and go out with Sidney. Would you . . .

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HATCHER: But we'd all go out together. I'll thow 'em out the door as long as Sidney's standing in here. Then I'll, we'll . . .

KIRK: You will throw them, you will throw them out the door as long as Sidney's standing in there with you?

HATCHER: Sidney's in here, yea, and then we'll all walk out together.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

KIRK: And then come out?

HATCHER: Uh-huh. But I'm gone tell you something now, I don't trust these, some of these trigger happy local Policemen. And I don't want none of 'em around here when we go out.

KIRK: Eddie, did I give you my word?

HATCHER: Well, I, you have to understand my, I've had a lot of people's word before. That's the reason we're in the mess we in now.

KIRK: You, you've never had my word before now.

HATCHER: Okay. But before we go out of here, it's, I want, what we just talked about is going down on tape so if something goes wrong . . .

KIRK: You'll hold me responsible.

HATCHER: No. Some of my people'll hold you responsible.

KIRK: Some of your people will hold me responsible.

HATCHER: Yea, uh-huh.

KIRK: Well I, I will accept that.

HATCHER: Okay.

KIRK: Because I hear what you're saying about local people, and . . .

HATCHER: That are trigger happy.

KIRK: Now we're gone, you understand we're using Mr. Paul Daly, a Federal Bureau of Investigation Agent from Charlotte.

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HATCHER: Where will we be, where will be taken to?

KIRK: Where will you be taken?

HATCHER: Uh-huh.

KIRK: I honestly do not know that.

HATCHER: Well I'm not, we're not, that's another thing, we're not going here to the Robeson County Jail.

KIRK: By the way, we wouldn't expect you to go to the Robeson County Jail.

HATCHER: Okay.

KIRK: I can guaran, I can guarantee that you will not go to the Robeson County Jail.

HATCHER: Okay.

KIRK: I can promise that.

HATCHER: Okay.

KIRK: It would probably be Raleigh or Charlotte, but I don't know that.

HATCHER: No, I don't want to go there.

KIRK: You don't want to go where?

HATCHER: To a big, I'll go to a small county jail somewhere, either Richmond County or ah . . .

KIRK: You want to go to a small, Richmond . . .

HATCHER: . . . ah, yea.

KIRK: I'm not sure that a federal agent can take you to a county jail. You're getting off into areas I don't know much about because I'm not a lawyer. We gone . . .

HATCHER: Well I want my safety to be, I, my . . .

KIRK: Your safety is our primary concern too.

HATCHER: Okay.

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KIRK: If, you know, we're talking about your meeting with, ah, Mr. Trotter and Secretary Dean and me, you know that Task Force?

HATCHER: Uh-huh.

KIRK: It would be much better for you to be in Raleigh, that's the safest place (unintelligible).

HATCHER: That, that's a rough jail.

KIRK: Rough jail?

HATCHER: Yea.

KIRK: I don't think, I don't believe you're right.

HATCHER: How overcrowded is it?

KIRK: It's not overcrowded because, we're talking about Central Prison or the Wake County Jail?

HATCHER: Well that's what I'm saying, which one you talking about? Are you talking about Central?

KIRK: We were talking, I, I thought I was talking about Central, but I guess I was talking about Wake

County. Where, where would you, which would you prefer in Raleigh?

HATCHER: I don't want to go to Central.

KIRK: You don't want to go to Central?

HATCHER: Hell no.

KIRK: Okay. I guess we can work out Wake County Jail. Okay, we'll work out Wake County Jail. We'll work out Wake County Jail. You there?

HATCHER: Yea. Okay, let me hang up and I'm gone talk to Timmy a minute and you have Sidney to call me.

KIRK: Okay. now, what we want to do is to get this typed, our, you understand in trying . . .

HATCHER: And I want Sidney to read it to me.

KIRK: Okay, you understand that as I read it to you,

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it's, I read it to you before we even had it typed . . .

HATCHER: Uh-huh.

KIRK: . . . 'cause I wanted to get your suggestions before we, before we typed it . . .

HATCHER: Okay.

KIRK: . . . that's , that's a show of faith that we're trying to work with you. Now, we're going to send Dan Danielly, the Governor's Personal Aid will get on a helicopter and will bring this down there as soon as we get it typed.

HATCHER: Okay.

KIRK: Would you be, would you be willing to let some hostages out when I call you and tell you the helicopter is there?

HATCHER: Uh-uh, no, no, uh-uh.

KIRK: You won't?

HATCHER: Sure won't, uh-uh.

KIRK: Okay.

HATCHER: When Sidney walks in this door, everbody'll go out happy . . .

KIRK: All right, nobody will go out until Sidney walks in the door?

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: Until Sidney walks in this door.

KIRK: Okay. All right, so we're gone get it typed up now, and the next person you hear from will be Sidney Locks.

HATCHER: All right.

KIRK: Thank you.

HATCHER: Bye.

(Conversation Ends)

[CE 7-2169 19]

(New Converation)

KIRK: This is the Governor's Office calling Mr. Hatcher.

UNKNOWN FEMALE: Okay. Hold just a second.

KIRK: Thank you.

(Pause)

HATCHER: Yea.

KIRK: Ah, this is Phil Kirk in Governor Martin's Office.

HATCHER: Uh-huh.

KIRK: Are we where, are we on an Eddie and Phil basis yet?

HATCHER: On a what?

KIRK: Can I call you Eddie?

HATCHER: Yea.

KIRK: Okay. Now the helicopter's getting ready to leave with the statement. Ah, it's just exactly as I read it to you, you might even be able to hear it when it takes off.

HATCHER: Well I tell you this now. We just had another, one of my informers from the outside, there's seventy-five heavily armed men circling this building here. Somebody better get the word to somebody.

KIRK: I will, and I've given you my word they'll be no shooting.

HATCHER: Yea, but see you don't know the local law enforcement officers. You don't know 'em. They're trigger happy.

KIRK: Okay, we'll get 'em moved back farther.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

HATCHER: Okay. I want 'em moved back. And I want to hear on bull horns tellin' 'em not to fire until they're ordered to fire. I want to hear it.

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KIRK: There won't be any order to fire.

HATCHER: Well, I want to hear that, though, I want to make sure they, 'cause you see, you don't realize what kind of local law enforcement we have here.

KIRK: I take your word for that.

HATCHER: Okay, well I'll take your word that you'll do that.

KIRK: I'm gone do it right now. And I also called you back, I've got some alternatives for you of trying to work with you, I've got some alternatives for you, ah, about ah, a jail to be taken to. And I've got three.

HATCHER: Okay.

KIRK: Three for you.

HATCHER: Okay.

KIRK: Ah, Orange, which is Chapel Hill. Guilford, which is Greensboro, and I'm sure you're familiar with the other one.

HATCHER: Orange in Chapel Hill.

KIRK: Orange in Chapel Hill?

HATCHER: Yea.

KIRK: Okay. That'll be the one then.

HATCHER: Okay.

KIRK: Orange in Chapel Hill.

HATCHER: Okay. But I'll, I'll tell you this nov. . . .

KIRK: (Unintelligible) Eddie.

HATCHER: . . . we have . . . okay.

KIRK: Orange is in, I told you wrong, Orange is in Hillsboro, that's the county seat outside Chapel Hill.

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HATCHER: All right.

KIRK: It's Orange County. Hillsboro.

HATCHER: Ain't that a very racist county?

KIRK: A racist county? No sir, that's the most liberal county in the state. Orange County is the most liberal county in the state right behind (unintelligible).

HATCHER: Is that where Chapel Hill School is?

KIRK: Yes sir. Chapel . . .

HATCHER: Oh, okay.

KIRK: . . . Chapel Hill is in Orange County, but Hillsboro's the county seat.

HATCHER: Okay, but now, now, I'll tell you this. We have been contacted by Mr. Vernon Bellcort and Russell Means with the American Indian Movement and there's twenty-six on airplanes right now on the way down here. I don't think nobody wants to intensify this situation more than what it is, so I'm willing to work with y'all, and I hope you're being honest and ready, ready to work and be willing to work with us.

KIRK: I, I've given you my word. I can't give you anything else.

HATCHER: Okay. Thank you.

KIRK: Now, ah, we've got, ah, Mr. Dan Danielly, who is Personal Aid to the Governor, is on the helicopter, it just took off. You'll be hearing from Representative Locks, ah, our, Mr. Danielly is to take the letter, the agreement that's signed to Mr. Locks who will then call and read it to you and then bring it over to you.

HATCHER: Okay.

KIRK: Okay.

HATCHER: Bye.

KIRK: And I'm countin' on you too.

[CE 7-2169 22]

HATCHER: Yes, don't worry.

KIRK: Okay.

HATCHER: Bye.

(Conversation Ends)

(New Conversation)

UNKNOWN MALE: Robesonian.

TRANSCRIPT ATTACHED TO AFFIDAVIT OF PHILLIP J. KIRK, CONT'D.

KIRK: Ah, this is the Governor's Office calling Eddie Hatcher.

UNKNOWN MALE: Okay. Hold on just a second.

KIRK: Thank you.

(Pause)

HATCHER: Yea.

KIRK: Eddie. Phil Kirk. Wanted to let you know that we got a radio report back, our helicopter just landed, ah, at the airport and they'll be to wherever Sidney Locks is in five to ten minutes.

HATCHER: Okay.

KIRK: Ah, any questions for me?

HATCHER: Well, I just want to make sure they ain't no trigger happy people out there.

KIRK: There are no trigger happy people out there. We've got it all under control, and I've been, been trusting you all day, and I want you to continue trusting me.

HATCHER: I will. Okay.

KIRK: Okay. Thank you Eddie.

HATCHER: Bye.

EXHIBIT 2 TO AFFIDAVIT OF PHILLIP J. KIRK, JR.
DATED MARCH 23, 1989

February 1, 1988

STATEMENT OF AGREEMENT ON BEHALF OF
GOVERNOR JAMES G. MARTIN

It is hereby agreed that in return for the safe release of all hostages, I will guarantee the following:

1. That Eddie Hatcher and Timothy Jacobs will be able to turn themselves over to the custody of Federal Bureau of Investigation Agent Paul Daly from Charlotte so that they can be safely removed from the building.
2. That John Hunt, presently in custody in the Robeson County Jail, will be transferred to another correctional facility away from Robeson County, not Central Prison, if he wishes to do so.
3. That a Task Force of the Governor's top advisors, Chief of Staff Phil Kirk, General Counsel Jim Trotter and Secretary Joe Dean of Crime Control & Public Safety, will meet with Mr. Hatcher and Mr. Jacobs and Mr. Hunt, as soon as it's safe to do so, to review all the allegations and evidence which they have of any crime, and see that it is investigated fully, and turn it over to the U.S. Attorney for appropriate action. The investigation is to include, but not be limited to, the Sheriff's Office, the District Attorney's Office and local and district SBI Offices.
4. That the death of Bobby McKellar in the Robeson County Jail will be fully investigated.

FOR GOVERNOR JAMES G. MARTIN
PHILLIP J. KIRK, JR.
CHIEF OF STAFF

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EXHIBIT 3 TO AFFIDAVIT OF PHILLIP J. KIRK, JR.
DATED MARCH 23, 1989

[handwritten note at top of letter]
10-19-88
Send copies to Jim Trotter & Joe Dean -
I don't remember any such agreement
Phil
save copy for file

October 18, 1988

Mr. Joe Freeman Britt
District Attorney
Robeson County Courthouse
Lumberton, NC 28359

Re: Mr. Eddie Hatcher and Mr. Timothy Jacobs

Dear Mr. Britt:

We understand from news reports that your office is considering the advisability of filing state criminal charges against Mr. Eddie Hatcher and Mr. Timothy Jacobs for the incident at The Robesonian on February 1.

We were surprised by those reports because we understand that the agreement that Mr. Hatcher and Mr. Jacobs reached with the Governor's office on February 1 would foreclose such charges. There was a clear understanding that Mr. Hatcher and Mr. Jacobs did not want to be subject to Robeson County law enforcement authorities in connection with that incident and that the Governor's office promised them that they would not be. We assumed that was why your office dismissed the warrants that were taken out and the United States Attorney's office undertook the criminal prosecution.

We certainly do not rely on news reports for this kind of information, and are confident that you will honor the agreement between Mr. Hatcher and Mr. Jacobs and the Governor's office. In the event, however, that you might be giving any consideration to such charges, we would like an opportunity to meet with you to discuss the matter as soon as possible and before any formal action is taken. We believe there are other legal as well as prudential

obstacles to any such charges and would be happy to discuss all of the considerations with you.

Very truly yours,
Lewis Pitts
Christic Institute South
Counsel for Timothy Jacobs
Barry Nakell
Counsel for Eddie Hatcher

PORTION OF AFFIDAVIT OF JAMES R. TROTTER

[caption omitted]

AFFIDAVIT

The undersigned, first being duly sworn, deposes and says:

My name is James R. Trotter. I am General Counsel to Governor James G. Martin.

On February 1, 1988, I was present, along with Joe Dean, Secretary of Crime Control and Public Safety, and Governor Martin, while Phillip J. Kirk, Jr., Chief of Staff, talked by telephone on behalf of Governor Martin with Edward Clark aka Eddie Hatcher concerning the release of the hostages Hatcher and Jacobs were holding in the office of "The Robesonian" newspaper. Kirk was the only person who spoke to Hatcher on behalf of Governor Martin. The results of the conversation between Kirk and Hatcher were reduced to writing. Exhibit 2, Kirk Affidavit, is a true and correct copy of that writing and recites accurately and fully the agreement reached between Kirk and Hatcher as I understood it.

***

[signature and notary block omitted]

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EXHIBIT A TO AFFIDAVIT OF JAMES R. TROTTER

October 19, 1988

Lewis Pitts, Esq.
Christic Institute South
Post Office Box 1105
Chapel Hill, North Carolina 27514

Barry Nakell, Esq.
1310 LeClair Street
Chapel Hill, North Carolina 27514

Gentlemen:

A copy of your letter dated October 18, 1988, to Joe Freeman Britt, Esq., has been made available to me.

The second paragraph of that letter says in part:

> ". . . [W]e understand that the agreement that Mr. Hatcher and Mr. Jacobs reached with the Governor's Office on February 1, would foreclose . . . [state criminal charges against Mr. Eddie Hatcher and Mr. Timothy Jacobs for the incident at The Robesonian on February 1] . . ."

Questions have arisen concerning this statement. To the end that an informed response can be given to the questions, it will be appreciated if you will advise by letter:

(a) The date, time and place the claimed agreement was made.

(b) The parties to the claimed agreement.

(c) The circumstances felt to be relevant:

  (i) leading up to the making of the claimed agreement;

  (ii) during the making of the claimed agreement; and

  (iii) following the making of the claimed agreement.

(d) Whether the claimed agreement was memorialized and, if so, how a copy of the memorial may be obtained.

(e) If the claimed agreement was not memorialized, the evidence upon which it is claimed that an agreement was made.

(f) The covenants and conditions of the claimed agreement and the term thereof, if any.

(g) The consideration said to support the claimed agreement.

LETTER TO PITTS AND NAKELL FROM JAMES TROTTER, CONT'D.

(h) Any other information that you feel will lead to an understanding of the claimed agreement.

I look forward to receiving your reply.

Sincerely,

James R. Trotter

EXHIBIT B TO AFFIDAVIT OF JAMES R. TROTTER

November 8, 1988

Mr. James R. Trotter
General Counsel
Office of the Governor
Raleigh, NC 27603

Dear Mr. Trotter:

We are writing to respond to your letter of October 19, 1988.

At our meeting with the Governor's Task Force on October 28, we expressed our appreciation to the Governor and the Task Force for their faithful commitment to honor the agreement reached between Mr. Hatcher, for himself and Mr. Jacobs, and Mr. Kirk, for the Governor, on February 1. By the conduct of the Governor and the Task Force in strict compliance with that agreement and from the discussion Mr. Nakell had with Mr. Kirk casually in the course of his defense interview of Mr. Kirk on September 21, 1988, we are convinced of that commitment.

Mr. Kirk testified in the federal trial that he clearly understood that Mr. Hatcher did not trust Robeson County law enforcement authorities. Mr. Kirk was adivsed by Sidney Locks and by Bruce Jones and David McCoy that Mr. Hatcher was afraid of the Sheriff, feared for the safety of John David Hunt in the custody of the Sheriff, and was concerned about the death of Billy McKellar in the Sheriff's custody. Mr. Kirk clearly knew that Mr. Hatcher was afraid that he would not be safe if he were ever in the Sheriff's custody. Accordingly, the first thing Mr. Kirk assured Mr. Hatcher on February 1, as soon as they had established mutual trust, was that Mr. Hatcher would be allowed to "give yourself up to federal, not state . . . federal officials." (Transcript, page 6.) That was effectively a promise to Mr. Hatcher that he would not have to give himself up to, or be subject to the jurisdiction of, local law enforcement authorities, including the Sheriff and his office. Mr. Kirk advised Mr. Hatcher that the federal official to whom he would surrender would be an F.B.I. agent from outside the area. (Transcript, page 7.) Mr. Kirk advised Mr. Nakell on October 28 that Mr. Hatcher was required to surrender to an F.B.I. agent rather than Mr. Locks or Mr. Cunningham because it had to be a person with arrest authority. Thus, it was clearly contemplated that the

surrender would be to the authority that would arrest Mr. Hatcher and subject him to prosecution. These agreements were summarized in the "STATEMENT OF AGREEMENT ON BEHALF OF GOVERNOR JAMES G. MARTIN" drafted, as we understand it, by the Governor, Mr. Kirk, Mr. Dean and yourself, and signed by Mr. Kirk, as follows: "It is hereby agreed that in return for the safe release of all hostages, I will guarantee the following: 1. That Eddie Hatcher and Timothy Jacobs will be able to turn themselves over to the custody of Federal Bureau of Investigation Agent Paul Daly from Charlotte so that they can be safely removed from the building." Mr. Kirk has frequently said that all of Mr. Hatcher's demands were reasonable. Mr. Hatcher's expressions of distrust of Robeson County law enforcement authorities was not confined to February 1 and continues today. The Governor's office promised Mr. Hatcher that he and Mr. Jacobs would not have to surrender to Robeson County law enforcement authorities. That promise was faithfully honored when the Federal Government pursued its prosecution and the State dismissed its warrants.

We would like also to call your attention to the following additional considerations against State prosecution:

A. Respect for our criminal justice system.

The State should accept the jury verdict in the federal prosecution. The Government presented its case thoroughly with zeal, vigor, and intensity. Indeed, it held Mr. Hatcher and Mr. Jacobs in preventive detention througout most of the pre-trial period and pressed for trial without awaiting the availability of Mr. Hatcher's chief trial counsel of choice. The Government was not denied any important evidence it sought to introduce; on the contrary, it succeeded in barring Mr. Hatcher and Mr. Jacobs from presenting their principal defense and the bulk of their evidence. The verdict did not depend on any technicality or any issue of federal jurisdiction. Instead, the verdict was a strong statement of the absence of mens rea for any of the offenses charged. In our society, such a verdict should set the charges at rest. People who were not present throughout the trial, who did not have an opportunity to hear and see the evidence as the jury did, who did not have the perspective of objectivity that the jury did, should not

question the jury's result. The State government should respect that verdict.

B. Double jeopardy.

In Bartkus v. Illinois, 359 U.S. 121 (1959), the Supreme Court held that the Double Jeopardy Clause does not generally bar a state prosecution following an unsuccessful federal prosecution. Nevertheless, the Court alluded to the fact that a state prosecution subsequent to an unsuccessful federal prosecution may, under appropriate circumstances, be held to violate Double Jeopardy, including presumably the collateral estoppel aspects of Double Jeopardy, if each prosecution is merely a tool of the same authorities. That consideration might apply in the extraordinary circumstances presented here.

In any event, the situation of reprosecution by a separate sovereignty following an acquittal in an adversary trial before a court exercising proper jurisdiction is a sensitive one. The United States Department of Justice has acted to minimize any potential abuse arising out of the power of state and federal governments generally to prosecute individuals for the same conduct by adopting the "Petite Policy," so-called because it was noted by the Supreme Court in Petite v. United States, 361 U.S. 529 (1960). The policy "precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution." Department of Justice Manual, Title 9, § 2.142(A), at p. 172. The second prosecution requires the approval of an Assistant Attorney General.

The States have also been sensitive to the need for prudence in this situation.

> "About half of the states have adopted statutes prohibiting state prosecution for offenses that relate to a previous federal prosecution, but these statutes vary considerably as to the extent of the prohibition. Some do not allow a state prosecution based on the same 'act or omission' as the federal prosecution, some do not permit a state prosecution unless it and the federal prosecution each require proof of a fact not required in the other, and on occasion state prosecution is barred

> merely because it is based upon the 'same transaction' as the prior federal prosecution."

LaFave and Israel, CRIMINAL PROCEDURE 923 (West 1985).

The prudential dictates of the Petite Policy and the laws of the majority of states recommend against a second prosecution. There is no compelling state interest supporting the dual prosecution. Indeed, there is no separate state interest in the prosecution. The state and federal interests are exactly the same and were both expressed together in the federal prosecution.

Mr. Hatcher and Mr. Jacobs have already served several months of hard time in connection with the federal charges. They have experienced overwhelming anxiety. They were required to mount an expensive, difficult and burdensome defense. They have suffered substantially as a result of the February 1 incident. If state charges are brought, the anxiety, the harassment, the stigma will be complicated by a revival of the fear of local authorities Mr. Hatcher discussed with the negotiators on February 1. In addition, Mr. Hatcher and Mr. Jacobs will be required to mobilize afresh the enormous resources they needed to meet the federal charges. General considerations of fairness counsel against imposing that monstrous burden on two men who have already endured it once and been acquitted. Of course, the reprosecution will also require a large commitment of resources on behalf of the State. The State jury should, and probably would, also acquit Mr. Hatcher and Mr. Jacobs. That is a fair forecast of the likely verdict on the basis of the decisive character of the federal jury verdict.

C. Priorities

The District Attorney's office in Robeson County has a substantial criminal caseload of serious crimes. The new District Attorney will need to establish priorities. The rampant drug trafficking and associated violence and corruption should receive primary attention. These are the problems that precipitated the events of February 1. To protect law and order in Robeson County, these are the crimes that need immediate and intensive attention. The citizens of Robeson County must be satisfied that these crimes are the top priority of State law enforcement authorities, beginning with the Governor's office, including the Department of Crime Control; the Attorney General's office, including the State Bureau

of Investigation; the Robeson County District Attorney's office; and local law enforcement agencies.

If any matter settled by "jury" verdict should be reopened, the obvious first candidate would be the homicide of unarmed Jimmy Earl Cummings by Deputy Sheriff Kevin Stone. The Robeson County District Attorney accepted the verdict of an unjustly convened inquest jury -- after a hearing that Bob Horne testified had the appearance of a whitewash because only one side was heard -- that the killing was either in self-defense or accidental, despite the incoherency of that alternative rationale. People who are truly concerned about justice and law-and-order should insist that this case involving the death of a citizen and serious questions about the criminal involvement of the son of the Sheriff be prosecuted for the first time, rather than that Mr. Hatcher and Mr. Jacobs be reprosecuted after an adversary trial resulted in their exoneration by a jury for conduct that was compassionate in quality and that caused no physical harm to any person and that represented, in the testimony of Bob Horn, the "conscience of the community."

D. The best interests of the community.

Robeson County needs to make progress in dealing constructively with its problems of discrimination, oppression, criminal violence, narcotics trafficking, and corruption. A second prosecution of Mr. Hatcher and Mr. Jacobs would not contribute to those important objectives but would set them back because it would signal that the authorities are more interested in retribution against these two victims than in effective action to resolve the serious problems plaguing the County. A second prosecution conducted in Robeson County would stir strong passions and protest. The County needs decisive action against its serious problems and to achieve this it needs efforts to unify the people, not to divide them or to enrage them with reprosecution of a case settled by a trial and a verdict in accordance with the American system of criminal justice.

We are sure you and all officers interested in this matter will agree that all of these circumstances considered together recommend overwhelmingly against reprosecution, and in favor of priority action to ensure justice for the citizens of Robeson County.

With all good wishes.

Lewis Pitts
Christic Institute South
Attorney for Timothy Bryan Jacobs

Barry Nakell
1310 Le Clair Street
Chapel Hill, NC 27514
Attorney for Eddie Hatcher

AFFIDAVIT OF JOHN STUART BRUCE
DATED MARCH 23, 1989

JOHN STUART BRUCE, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Eastern District of North Carolina. I have served in that capacity for approximately six years. At all times relevant to the subject of this affidavit, I served in the Office of the United States Attorney as Chief of the Criminal Section. From August, 1987, until March 11, 1988, my immediate supervisor was Acting United States Attorney J. Douglas McCullough. Since March 11, 1988, my immediate supervisor has been Margaret Person Currin, United States Attorney.

2. On February 1-2, 1988, I was in Richmond, Virginia, for oral arguments in two appellate cases. I arrived back in Raleigh, North Carolina, in the early evening of February 2, 1988. That evening I discussed the hostage-taking incident which had occurred at The Robesonian in Lumberton, North Carolina, with Acting United States Attorney McCullough by telephone. He assigned the case to me. From that time forward, I have been the assigned Assistant United States Attorney in the case of United States v. John Edward Clark, a/k/a/ Eddie Hatcher, and Timothy Bryan Jacobs (No. 88-7-CR-3, E.D.N.C.). In that capacity, I directed the prosecution of the Federal case, subject to supervision of the United States Attorney.

3. In the course of the prosecution of this case, I have thoroughly reviewed all evidentiary material and have talked to various persons who acted as negotiators with the hostage-takers on February 1st.

4. Neither I nor any other representative of the the United States Attorney for the Eastern District of North Carolina, or the United States Department of Justice, has ever entered into any agreement, understanding, or promise to limit in any way State prosecution of Eddie Hatcher and Timothy Jacobs in connection with the February 1st hostage-taking incident. To my knowledge, based on my review of the evidence and discussions with virtually everyone involved in the case in the Federal and State Government, no agent for the Office of the District Attorney for

Robeson County or any other agent of the State of North Carolina has ever entered into any agreement, understanding, or promise to limit in any way State prosecution of Hatcher and Jacobs in connection with the February 1 incident.

5. On February 11, 1988, I met in my office with Mr. Bob Warren and Mr. Bruce Cunningham, who at that time were jointly representing both defendants Hatcher and Jacobs in the Federal case. At that time, Mr. Warren questioned the jurisdictional basis of the hostage-taking charge contained in the recently returned Federal Indictment. See 18 U.S.C. § 1203. Though in my professional judgment the Federal jurisdiction with respect to that count was properly alleged, and I anticipated that it could be proven at trial, my reply to Mr. Warren indicated that a State prosecution for kidnapping was still very possible.

6. On February 17, 1988, I was advised by a Special Agent of the State Bureau of Investigation that warrants charging Hatcher and Jacobs with second-degree kidnapping in State Court had been obtained on February 1, 1988. I continued at various times over the next several months to communicate my view to State authorities that the possibility of State prosecution be left open. Specifically, on March 9, 1988, I spoke by telephone with an Assistant District Attorney in Robeson County. I informed him that the defendants were aggressively challenging Federal jurisdiction on the hostage-taking count. I indicated that, even though I was optimistic about the prospects for conviction on the hostage-taking charge, it was my recommendation that the State leave open the option of a kidnapping prosecution in the event Federal authorities were unable to obtain a conviction for hostage-taking.

7. During the pendency of the Federal case, neither defendant, nor any of their attorneys or representatives, ever expressed to me or in my presence, or in any pleading filed in the case, the view that the State of North Carolina had promised or agreed not to prosecute Hatcher and Jacobs for offenses arising out of the February 1 incident. To the contrary, the defense concentrated their attack on a perceived lack of Federal jurisdiction, and frequently argued that neither Hatcher nor Jacobs had ever asked for immunity or a promise not to prosecute as a quid pro quo for surrender and release of the hostages.

Further, affiant saith not.

[signature and notary block omitted]

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LETTER TO BRUCE CUNNINGHAM FROM JOHN STUART BRUCE DATED FEBRUARY 26, 1988

[date and inside address omitted]

Dear Mr. Cunningham:

Pursuant to Fed. R. Crim. P. 16(a) and Local Rule 43.01, please find enclosed numerous items relating to this case listed below. In order to assure compliance with the Government's discovery obligations and to eliminate litigation over discovery, the Government is pursuing an "open file" discovery policy in this case. That is, in addition to other items of discovery being provided, we are providing at this early juncture all memoranda of of interviews with potential Government witnesses. Not included in the items provided are the transcripts of testimony of witnesses before the Grand Jury. These transcripts will be turned over prior to the beginning of the trial.

The following is a list of the items enclosed:

1. Memoranda of interviews, prepared by the Federal Bureau of Investigation (Form FD-302), with the following persons:
    a. Deborah Karr Adams
    b. William Samuel Batten
    c. Larry Blue
    d. Bobby Stafford Horne
    e. Salvatore Michael Mangiameli
    f. Darwin Hardin
    g. Roy Neal Cox
    h. Renee Bollinger
    i. Raymond Lee Godfrey
    j. Tonya Inez Dial
    k. Eddie Hatcher
    l. Timothy Bryan Jacobs
2. Transcripts of the following audio recordings of telephone conversations:
    a. Conversations among Eddie Hatcher, Tom Childrey, Bruce Cunningham, Connee Brayboy, Bob Horne, and Timothy Jacobs

b. Conversations among Eddie Hatcher, Sidney Lox, Connee Brayboy, Joy Johnson, and Cheif Albert Carol

c. Conversations among Eddie Hatcher, Sidney Lox, and Joy Johnson

d. Conversation between Eddie Hatcher and Phil Kirk

3. Memoranda prepared by the Bureau of Alcohol, Tobacco, and Firearms:

a. Statement of Special Agent Carl D. Bowers

b. Statement of Special Agent Samuel J. Lewis

c. Statement of Special Agent Geneva L. Miller concerning her participation in the investigation

d. Report of interview with Special Agent Jack Davis, State Bureau of Investigation prepared by Geneva L. Miller, Special Agent.

e. Report of interview with Special Agent William Godley, State Bureau of Investigation, prepared by Geneva L. Miller, Special Agent.

f. Report of interview with Albert L. Carol, prepared by Carl D. Bower, Special Agent.

g. Statement of Lindsey Lee Locklear

h. Report of interview with Curt Locklear, prepared by Carl D. Bowers, Special Agent.

i. Report of interview with Renee Bollinger, prepared by Geneva L. Miller, Special Agent.

j. Report of interview with Larry Blue, prepared by Geneva L. Miller, Special Agent.

k. Report of interview with Tonya Inez Dial, prepared by Geneva L. Miller, Special Agent.

l. Report of interview with Rodney Lee Godfrey, prepared by Geneva L. Miller, Special Agent.

m. Report of interview with Roy Neil Cox, prepared by Geneva L. Miller, Special Agent.

n. Report of investigation prepared by Special Agent Carl D. Bowers, dated 2/8/88.

o. Property inventory of BATF dated 2/3/88.

4. Reports prepared by the North Carolina State Bureau of Investigation:
   a. Report dated February 4, 1988 prepared by Special Agent A. D. Grant containing description of crime scene and list of physical evidence obtained from crime scene including a description of the handwritten demands of the defendants. This report includes a log of telephone calls made to and from the State Bureau of Investigation command post on February 1, 1988. This report further includes memoranda of interviews conducted by the State Bureau of Investigation of the following persons:
      1) Karen Godfrey
      2) Jeralene Gibbs
      3) Jo Ann Manns
      4) Eric Zeigler
      5) Linda Barnes
      6) Pat Horne
      7) Mary Ann Mayers
      8) Donna Pipes
   b. Report of activity of Special Agent D. V. Parker.
   c. Activity log of supervisor R. W. Davis.
   d. Report prepared by Special Agent L. M. Pearce including memoranda of interviews with the following persons:
      1) Deborah Karr Adams
      2) Salvatore Michael Mangiameli
      3) Ricky McKinnon
   e. Report of Special Agent J. R. Bowman on arrests of the defendants.
   f. Report of Special Agent M. K. Kiger including memoranda of interviews with the following persons:
      1) William Samuel Batten
      2) Lee Eldridge Hamilton
      3) Darwin Hardin
5. Photocopies of Government Exhibits 1-6 introduced at detention hearings held on February 17 and 19, 1988.

LETTER TO BRUCE CUNNIMGHAM, CONT'D.

6. Photocopies of the following newspaper accounts:
   a. "Lumberton, Robesonian Are Back To Normal", The Fayetteville Observer, date unknown
   b. "Martin Agrees To Form Task Force For Indians", The Durham Sun, 2/2/88
   c. "Despite Hostage Situation, Atmosphere Was Fairly Relaxed", The Robesonian; 2/1-2/88
   d. "Police Credited For Bringing Crisis To A Peaceful End", The Fayetteville Observer, 2/3/88
   e. "Tuscarora Pair To Be Held Here", The Fayetteville Observer, 2/12/88
   f. "Hostages: Pair Feared Officers Would Kill Them", Fayetteville Times, 2/3/88
   g. "Jacobs: I just Hope People Understand Why I Did What I Did", The Robesonian, 2/2/88
   h. "Siege in Lumberton", Fayetteville Observer, 2/7/88
   i. "Robeson Inmate Who Was Included In Siege Agreement Released On Bond", Fayetteville Observer, 2/6/88
   j. "State Officials, Siege Suspects Meet In Prison", Fayetteville Times, 2/9/88
   k. "Gunman Takes Seventeen Hostages In Lumberton", The Fayetteville Observer, 2/1/88
   l. "It Was A Day That Won't Soon Be Forgotten In Robeson County", Fayetteville Observer, 2/2/88
   m. "No Shots Fired As Siege Ends", Fayetteville Observer, 2/2/88
   n. "Hatcher Praised As Dedicated To Good Cause", Fayetteville Observer, 2/2/88
   o. "McKellar Death Key Concern", The Fayetteville Observer, 2/2/88
   p. "Reporter Hid, Kept Phone Lines Open To Police", The Fayetteville Observer, 2/2/88
   q. "Lumberton Newspaper Gets Back To Work", The Fayetteville Observer, 2/2/88
   r. "Captors Voice Concerns About Prejudice, Corruption", Fayetteville Times, 2/2/88

LETTER TO BRUCE CUNNIMGHAM, CONT'D.

s. "Reporter Hides, Listens To Captors", Fayetteville Times, 2/2/88

t. "Hostages Freed In Lumberton", Fayetteville Times, 2/2/88

u. "On The Outside, The Waiting Was Tense", The Fayetteville Times, 2/2/88

v. "Paper Staff Admirable In Ordeal", Fayetteville Times, 2/2/88

w. "Just A Normal Day Until, Put The Phone Down", Fayetteville Times, 2/3/88

x. "Hatcher, Jacobs Concerns Portrayed", Fayetteville Times, 2/3/88

y. "Robeson Officials: Probe Welcome", Fayetteville Times, 2/3/88

z. "Newsmakers Back To Publishing", Fayetteville Times, 2/3/88

aa. "Report Says Justice Not Equitable For Indians", Fayetteville Times, 2/3/88

bb. "Hostages: Pair Feared Officers Would Kill Them", Fayetteville Times, 2/3/88

cc. "Possible Conspiracy To Be Investigated", Fayetteville Times, 2/3/88

dd. "Robeson Hostage Task Force Meets With Suspects", Fayetteville Observer, 2/9/88

ee. "Jacobs' Mother Says She Is Sorry She Didn't Listen To Her Son", The Robesonian, 2/5/88

ff. "Lumberton Gunman In Court", Fayetteville Observer, 2/3/88

gg. "Lawyer Kunstler May Defend Robeson Duo", Fayetteville Observer, 2/9/88

hh. "Behind Hostage Case, Issues of Rural Justice", New York Times, 2/8/88

ii. "State Officials, Siege Suspects Meet In Prison", Fayetteville Times, 2/9/88

jj. "Grand Jury Indicts Two Robeson Indians In Hostage Case", Fayetteville Times, 2/10/88

LETTER TO BRUCE CUNNIMGHAM, CONT'D.

kk. "Hatcher's Attorney to Meet With Defendant's In Butner Today", The Robesonian, 2/4/88

"Gunman Swaps Seventeen For Probe", USA Today, 2/2/88

mm. "NC Hostage-takers Cite Race Bias", USA Today, 2/2/88

nn. "Both Captors Had Record", Fayetteville Observer 2/2/88

oo. "Lumberton, Robesonian Are Back To Normal", Fayetteville Observer, 2/3/88

pp. "Police Credited For Bring Crisis To A Peaceful End", Fayetteville Observer, 2/3/88

qq. "Leaders Back Demand For Robeson Probe", Fayetteville Observer, 2/3/88

rr. "Hostage Editor Wants Investigation", Fayetteville Observer, 2/5/88

ss. "Robeson Inmate Who Was Included In Siege Agreement Released On Bond", Fayetteville Observer, 2/6/88

tt. "Race Rights Commission Gets Backing", Fayetteville Observer, 2/5/88

uu. "Reform Focus", Fayetteville Observer, 2/6/88

vv. "Robeson Plans Grievance Panal Following Siege", Fayetteville Times, 2/5/88

ww. "Officials Seek Calm In Robeson", Fayetteville Observer, 2/4/88

xx. "Martin Vows Support For Robeson Probe Task Force", Fayetteville Times, 2/5/88

yy. "Task Force To Meet Indians From Siege", Fayetteville Observer, 2/4/88

zz. "Hearing Set On Allegations Of Two Activists", Fayetteville Times, 2/4/88

aaa. "Officials Discuss Ways To Defuse Tensions In Robeson", Fayetteville Times, 2/4/88

bbb. "Martin Advised Not To Negotiate", The Robesonian, 2/1-2/88

ccc. "Thanks To So Many Who Helped Monday", The Robesonian, 2/3/88

ddd. "Robesonian Hostages Released", The Robesonian, 2/1-2/88

eee. "Hatcher's List of Demands", The Robesonian, 2/1-2/88

fff. "Hatcher Explains His Cause" The Robesonian, 2/1-2/88

ggg. "Jacobs: I Just Hope People Will Understand Why I Did What I Did", The Robesonian, 2/1-2/88

hhh. "Statement Of Agreement On Behalf Of Governor James G. Martin", The Robesonian, 2/1-2/88

iii. "Despite Hostage Situation, Atmosphere Was Fairly Relaxed", The Robesonian, 2/1-2/88

jjj. "Eighteenth Hostage Hid Quietly, Unbeknownst To Captors The Robesonian, 2/1-2/88

kkk. "Hatcher, Jacobs May Face Life", The Robesonian, 2/3/88

lll. "Federal Grand Jury To Convene Tuesday", The Robesonian 2/8/88

mmm. "Hatcher's Mother Says He Took Hostages To Protect His Life", The Robesonian, 2/8/88

nnn. "Governor's Aide Cried When Hostages Freed", The Robesonian, 2/7/88

ooo. "Hatcher's Actions Surprised Those Who Knew Him Best", Robesonian, 2/7/88

ppp. "Hunt Makes Bond, Released From Jail", The Robesonian, 2/5/88

qqq. "Indian Commission Director Unaware Of Aim Legal Aid", The Robesonian, 2/5/88

rrr. "February 1, 1988 Will Live With Us Forever", The Robesonian, 2/7/88

sss. "Evidence Found In Hatcher's Apartment", The Robesonian, 2/5/88

ttt. "Court Maze In Robeson Draws Fire", Fayetteville Oberver, 2/15/88

uuu. "Robeson Problems Evident In 1982", Fayetteville Times, 2/15/88

vvv. "Harmony Is Theme At Form In Robeson", Fayetteville Times, 2/15/88

www. "County's Court System Can Be Frustrating", Fayetteville Times, 2/15/88

xxx. "Hatcher, Jacobs Sent To Fayetteville", Fayetteville Observer and Times, 2/13/88

yyy. "Stone Letter Reported On Behalf of Inmate", Fayetteville Observer and Times, 2/15/88

zzz. "Allegations: Task Force As Help In Robeson Jail -- Death Probe", Fayetteville Observer and Times, 2/13/88

aaaa. "Tuscarora Pair To Be Held Here", The Fayetteville Observer, 2/12/88

bbbb. "Tuscarora Indians Plan Public Forum", The Fayetteville Times, 2/12/88

cccc. "Indictment Names Pair In Takeover", The Fayetteville Observer, 2/10/88

dddd. "Paper Wasn't Random Target, Hatcher Letter May Suggest", Fayetteville Observer, 2/10/88

eeee. "Jacobs' Dad Plans To Drop Threat Charges", Fayetteville Observer, 2/10/88

ffff. "Task Force, Hatcher, Jacobs Meet", The Robesonian, 2/9/88

gggg. "Hatcher, Jacobs Indicted", The Robesonian, 2/10/88

hhhh. "Letters Criticize Paper Before Seige", The Fayetteville Times, 2/11/88

If you wish to inspect any items of physical evidence listed in the above reports or listen to the audio recordings, such an inspection can be arranged by appointment. Because the offense occurred unexpectedly only twenty-six (26) days ago, the Government's investigation is continuing. Should any other discoverable material come to our attention during the investigation or trial preparation we will promptly disclose it pursuant to Fed. R. Crim. P. 16(c).

These materials are provided for discovery purposes only for use by you in trial preparation. Further dissemination of these

materials, with the exception of the newspaper articles, of course, may be prohibited without court order.

By this letter we hereby request reciprocal discovery pursuant to Fed. R. Crim. P. 16(b) and notice of insanity defense or evidence of mental condition, pursuant to Fed. R. Crim. P. 12.2, and notice of alibi defense, pursuant to Fed. R. Crim. P. 12.1.

If you have any comments or questions, please do not hesitate to contact the undersigned.

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PORTIONS OF AFFIDAVIT OF BARRY NAKELL (UNDATED)

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* * *

2. On October 14, 1989, Plaintiffs Eddie Hatcher and Timothy Jacobs were found not guilty in federal court on all charges in a seven count indictment arising out of the takeover of the Robesonian newspaper office on February 1, 1988, and were released from custody. United States v. Clark, No. 88-7-01-CR-3 (E.D. N.C.).

Mr. Jacobs was represented at the federal trial by Mr. Bob Warren, a member of the North Carolina Bar, and Mr. Lewis Pitts, a member of the South Carolina and District of Columbia Bars who was admitted pro haec vice. Mr. Eddie Hatcher was not represented by counsel at the federal trial. Mr. William Kunstler had been his chief trial counsel, but he was engaged in trial in New York during the federal trial and the Court refused to continue the trial to enable him to appear. I filed a limited appearance as local counsel for Mr. Hatcher and, together with Mr. Ronald Kuby and Ms. Stephanie Moore, as well as Mr. William Kunstler, performed considerable legal work in preparation for and during the federal trial.

Mr. Martin McCall, the Administrative Assistant for District Attorney Joe Freeman Britt, attended the federal trial.

3. I joined the defense team for Mr. Hatcher in the federal prosecution in late March of 1989. Thereafter, I met with Assistant United States Attorney John Bruce in person and by telephone frequently during the course of that proceeding.

One of the subjects that I discussed with Mr. Bruce was a possible plea arrangement for Mr. Hatcher and Mr. Jacobs. I was authorized by Mr. Hatcher and the other attorneys representing him to explore this matter on behalf of Mr. Hatcher and by Mr. Jacobs and his attorneys to explore this matter on behalf of Mr. Jacobs as well.

On June 20, 1988, Mr. Bruce wrote me a letter confirming a proposed plea agreement with regard to Mr. Hatcher that he had previously outlined to me. A copy of that letter is App. B, Exhibit 36. I understood that he sent a similar proposal to Mr. Jacobs'

counsel. Those proposals were not acceptable to Mr. Hatcher or Mr. Jacobs.

On behalf of Mr. Hatcher and Mr. Jacobs, I made the following plea proposal to Mr. Bruce: Mr. Hatcher and Mr. Jacobs would enter conditional guilty pleas to Counts two and three and an unconditional guilty plea to one of the last four counts of the seven-count superseding indictment. Counts two and three charged Mr Hatcher with federal hostage-taking, in violation of 18 U.S.C. § 1203, and use of firearms in the course of federal hostage-taking, in violation of 18 U.S.C. § 924. The last four counts charged offenses that did not depend upon a federal hostage-taking violation, so that a conviction on a plea to one of those counts would subject Mr. Hatcher and Mr. Jacobs to sentencing at least on that count even if the other two counts did not stand up on appeal. The conditional character of the plea would be pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, allowing Mr. Hatcher and Mr. Jacobs to reserve the right to appeal from the judgment as to those two counts, after stipulating to an adverse determination on pre-trial motions that Mr. Hatcher and Mr. Jacobs had filed to dismiss the federal hostage-taking charges on the ground of insufficient evidence. The issue on the insufficiency question was whether the evidence showed that Mr. Hatcher and Mr. Jacobs had made their demands only on the Government of the State of North Carolina and not on the Government of the United States, so that an essential element of the offense was not satisfied.

Mr. Bruce refused that offer. He explained that his position was that any arrangement would have to include an unconditional guilty plea on the federal hostage-taking count.

In all of my discussions with Mr. Bruce, the only basis upon which I tried to persuade him was the merits of the case. I explained to Mr. Bruce why I thought the evidence did not satisfy the essential element of the federal-hostage-taking statute, and I never mentioned any extraneous or improper matter to him.

I was surprised that Mr. Bruce did not enthusiastically accept our proposal. I thought it was an offer he could not refuse. Mr. Bruce was adamant, however, about seeking a conviction on the federal hostage-taking charge. When I asked him to identify for me the evidence upon which he relied for the essential element of

that charge, however, he regularly told me only that he would present his evidence at trial. I sensed that Mr. Bruce was under pressure from some outside source to pursue the federal hostage-taking charge vigorously, because of the tenacious way he held onto it without being able to support it in our discussions, even to the point of letting it stand in the way of a very attractive plea arrangement on behalf of Mr. Hatcher and Mr. Jacobs. I surmised that the outside pressure might have come from state officials, who then appeared to have given up prosecuting the case in favor of the federal prosecution and I thought Mr. Bruce might have extended himself with assurances about what he would accomplish. I tried to explore this idea on two occasions in my discussions with Mr. Bruce, but he declined to be drawn into any disclosure of any discussions he might have had with state officials.

* * *

12. On October 28, 1988, Mr. Pitts and I met with the Governor's Task Force for the purpose of discussing the investigation into the allegations regarding Robeson County officials. Upon being introduced to Mr. Trotter, I advised him that Mr. Pitts and I would shortly reply to his letter about the agreement. Otherwise, the meeting focused on its topic.

I told the Task Force that we appreciated its willingness to meet with us and its commitment to honor the February 1 agreement with Mr. Hatcher, and that we appreciated those steps that the Governor's office had already taken and was in the process of taking to improve the conditions in Robeson County.

After Mr. Pitts provided the Task Force additional evidence, members of the Task Force explained that the Governor had little or no authority to investigate the allegations, and that the Task Force could do no more than turn evidence it received over to the United States Attorney's office. They suggested that Mr. Pitts and I meet with the Attorney General.

V.

13. On November 3, 1988, Mr. Pitts and I did meet with Attorney General Lacy Thornburg in his office. Deputy Attorney General Alan Briggs was also present.

14. The meeting began with casual conversation. Then Mr. Thornburg said that the drug situation in Robeson County was no

worse than in other places and that "we've had agents there for three and one-half years." Mr. Pitts challenged Mr. Thornburg to identify another county with as serious a drug problem. Mr. Thornburg said there were many, and that the problem in Robeson County was the dissension between the people. Mr. Pitts told Mr. Thornburg that he was blaming the victims. The meeting got tense; Mr. Thornburg asked Mr. Pitts to leave his office. Mr. Briggs and I tried to calm the meeting down and lead it back to a discussion of the situation. The meeting did not, however, continue. While standing, Mr. Thornburg and I chatted for a few minutes while Mr. Briggs and Mr. Pitts did the same. I apologized to Mr. Thornburg for the tone that Mr. Pitts had used, and explained to Mr. Thornburg that we were trying to assure that an adequate investigation of the allegations of law enforcement corruption in Robeson County was conducted by the proper authorities, and to assure that if such an investigation were conducted there would be a way to communicate that to the concerned community.

Mr. Thornburg assigned Mr. Briggs to work with me on the situation in Robeson County.

15. The meeting took place during the election. Early in the meeting, Mr. Thornburg told us that his opponent was scheduled to hold a press conference in Robeson County that morning. Mr. Thornburg said that he heard that Sheriff Stone might join his opponent at the press conference. I said that I thought Sheriff Stone was a major political ally of his. Mr. Thornburg replied that he did too. At the conclusion of the meeting, Mr. Thornburg got a report on the press conference and was told that Sheriff Stone had not attended. He said he was very relieved.

* * *

17. Shortly thereafter, Mr. Briggs and I had a telephone conversation in which we discussed the effort to coordinate the Robeson County investigation between the Attorney General's office and the Governor's Task Force. Mr. Briggs told me that when Mr. Thornburg had told Mr. Pitts and myself that he had agents in Robeson County for three and one-half years he was only referring to the regular assignment of SBI Agents during the term he had been in office; that he was not talking about any special investigation; and that there had been no such special effort. Mr.

Briggs also told me that Mr. Pitts was persona non grata in the Attorney General's Office but that I was still considered in good standing.

* * *

34. Mr. Charles Bryant the Chief of the Security Police at Pembroke State University in Robeson County, and Mr. Ed Jacobs, the Assistant Chief, provided the following information (see App. B, Exhibit 12):

After the federal acquittal, Mr. Hatcher occasionally came on the campus of Pembroke State University and made purchases in the campus book store. One day he came to meet with the student government. About 5:00 on the afternoon of that day Sheriff Stone called Assistant Chief Jacobs and told Mr. Jacobs that he had a student in his office who said that Mr. Hatcher was on campus with a gun, right across from the police station, and the officers did not do anything about it. Mr. Jacobs said he did not know anything about it. He checked with the officers on duty. They said they had seen Mr. Hatcher but that Mr. Hatcher had no gun. Mr. Jacobs called Sheriff Stone back, told him what he had learned, and assured him that they would not tolerate anybody bringing a gun on the campus. Sheriff Stone said he told the student to report the incident to the campus police, but no student ever did.

Three weeks later Mr. Hatcher came to a meeting on the campus. Assistant Chief Jacobs was in the building and Mr. Hatcher approached him. Mr. Jacobs told Mr. Hatcher that he had received a report that Mr. Hatcher had had a gun on campus. Mr. Hatcher told him that he had not. Further, Mr. Hatcher told Mr. Jacobs that he was then with his mother, that his car was across the street, off campus, and that his weapon was in the car. Mr. Jacobs told Mr. Hatcher: "If you do bring a gun on campus, I'll have to take appropriate action."

Thereafter, two SBI agents came to see Chief Bryant in his office one afternoon. They went to the Student Center together to talk. The agents told Mr. Bryant they wanted to talk to him about Mr. Hatcher. They said that they had information that while Mr. Hatcher was locked up during the federal prosecution Mr. Hatcher had been calling Mr. Bryant's house. They asked about Mr. Bryant's affiliation with Mr. Hatcher and wanted to know why Mr. Hatcher had been calling his house. Mr. Bryant told them that both

he and his wife were members of the Tuscarora Tribe, that his wife worked for the Tribe as a secretary at a time when Mr. Hatcher also worked for the Tribe. The agents asked whether Mr. Hatcher called collect or paid for the calls. Mr. Bryant said he called collect. The agents asked what the conversations were about. Mr. Bryant replied that they should talk to his wife about that and that he would give them the privilege to do so. The agents never did talk to Mr. Bryant's wife.

The agents told Mr. Bryant they had heard that he and his officers were letting Mr. Hatcher bring a gun on campus and not arresting him for it. Mr. Bryant said that was not true. He said that report, four or five weeks earlier, had been checked out with all their officers and found to be not true. He further told the agents that he and his officers would treat Mr. Hatcher just like anybody else. Mr. Bryant wondered why the SBI Agents were interested in this at all, especially so long after it happened and after his Assistant had already investigated the situation and reported to the Sheriff about it.

The agents asked Mr. Bryant about Mr. Keever Locklear. Mr. Bryant told them he as a member of Mr. Locklear's Tuscarora group and a friend of Mr. Locklear. The agents asked Mr. Bryant to provide them a copy of Mr. Locklear's tribal rolls. He told them they would have to ask Mr. Locklear for that.

Mr. Bryant said that shortly before this visit, his supervisor told him that he had been advised that Mr. Bryant was involved in setting up the takeover and that he was going to be arrested for it.

* * *

44. On January 26, 1989, Judge Anthony Brannon of the Robeson County Superior Court entered an order that is reproduced in App. B, Exhibit 24. (It is also part of Exhibit 14 to the Appendix to the State Defendants' Memorandum in Support of their Motion to Dismiss.) Public Defender Angus Thompson telephoned me on January 30, 1989, to tell me about the order, which he said he found in his box on January 27, 1989, and to discuss concerns that he had about it. He also told me that Ms. Brayboy had called him a week or two earlier and told him that Mr. Jacobs was interested in being represented by his office and trying to work something out. Mr. Thompson told me that he had declined because he anticipated that his office would represent Mr.

Hatcher because he was in the process of bringing into his office the attorney who had been appointed to represent him. He also told me that he had told both Judge Brannon and Mr. Townsend that he had been approached by a person who had said that Mr. Jacobs might be interested in being represented by the Public Defender, but that he had a conflict. Mr. Thompson further told me that the previous week Ms. Brayboy and Mr. Little Turtle were in the District Attorney's office. Mr. Townsend sent them to see Mr. Thompson. They told Mr. Thompson they were concerned about whom Mr. Jacobs would get for a "local lawyer."

45. I prepared a first draft of the complaint and circulated it to all the attorneys on January 16, 1989. Within ten days we had a third draft ready.

46. On Friday, January 27, 1989, Mr. Pitts and I met in Mr. Pitts' office to review the third draft of the Complaint, planning to put it in final shape over the weekend.

While I was sitting in Mr. Pitts' office, Ms. Brayboy telephoned Mr. Pitts. I listened to Mr. Pitts' end of the conversation. Mr. Pitts told me that Ms. Brayboy said that she and Mr. Ray Little Turtle had met with Mr. Townsend, and that Mr. Townsend said that he would agree to allow Mr. Jacobs to plead to a misdemeanor and be given probation. She further said that he conveyed hostility towards the Christic Institute South but said that he would work with any lawyer representing Mr. Jacobs. She said that Mr. Townsend had repeated that he would work with any attorney of Mr. Jacobs' choice. Ms. Brayboy emphatically stated that it was her impression that Mr. Townsend would not enter into any agreement with Mr. Pitts. Ms. Brayboy said she thought Mr. Bob Warren might be acceptable.

Mr. Pitts and I had a long discussion about the plea bargaining situation. I encouraged Mr. Pitts to pursue any plea bargaining opportunity, as I had done earlier. I promised to explain the propriety of that to Mr. Hatcher. Mr. Pitts surmised that, if filed, the lawsuit might hinder any plea opportunity for Mr. Jacobs. Mr. Pitts was concerned about the prospect that the lawsuit might destroy any possibility for favorable plea discussions on behalf of Mr. Jacobs.

47. Mr. Pitts decided to call Mr. Townsend directly to see if there was any point in arranging a meeting, and to schedule one if

there was. I remained in the office while that call was made. Mr. Pitts told Mr. Townsend he was interested in arranging a meeting to discuss a possible plea for Mr. Jacobs. He asked Mr. Townsend whether a misdemeanor plea would be in the ballpark. Mr. Pitts told me that Mr. Townsend told him that he would only consider a plea by Mr. Jacobs to felonies and would not agree to any sentence that did not include prison. Mr. Pitts concluded that any meeting would be fruitless and therefore did not schedule one. He therefore decided that such concerns should not interfere with the filing of the lawsuit. But he said that even after the suit was filed, he thought it should not be allowed to block a favorable plea opportunity for Mr. Jacobs. If such should materialize and it should require Mr. Jacobs to withdraw from the suit, he thought the plea opportunity should still take priority for Mr. Jacobs.

* * *

49. On Monday morning, January 30, Mr. Pitts and I met again. We had the complaint ready to file. Mr. Pitts told me that Ms. Brayboy had telephoned him over the weekend and told him that Mr. Townsend was still willing to offer Mr. Jacobs a plea to a misdemeanor and probation, and that he had decided that he and Bob Warren should arrange a meeting with Mr. Townsend to pursue any opportunity for a favorable plea arrangement for Mr. Jacobs, even though he questioned the reliability of Ms. Brayboy's information. Mr. Pitts believed it was necessary to delay the filing of the suit to give that approach the most satisfactory environment to succeed. He was still afraid that the lawsuit might destroy any lenient attitude in the District Attorney's office. We agreed to do that. Mr. Pitts and Mr. Warren met with Mr. Townsend the next day to discuss a possible plea arrangement, without making any mention of the contemplated lawsuit. Only when that meeting proved unsuccessful did Mr. Pitts approve the filing of the action.

* * *

AFFIDAVIT OF LEWIS PITTS (UNDATED)

[caption omitted]

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3. On October 14, 1988, Plaintiffs Eddie Hatcher and Timothy Jacobs were found not guilty in federal court on all charges arising out of the takeover of the Robesonian newspaper office on February 1, 1988, and were released from custody.

Mr. Jacobs was represented at the federal trial by Mr. Bob Warren, a member of the North Carolina Bar, and myself. I was admitted pro haec vice. We were assisted by Mr. Alan Gregory, Ms. Gayle Korotkin, and Ms. Ashaki Binta, who are all members of the staff of the Christic Institute South.

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6. After the federal acquittal, Plaintiff Timothy Jacobs stayed away from Robeson County, except for brief visits to see his family. I understood that Plaintiff Eddie Hatcher stayed away for several days but then returned to work with the other Plaintiffs to improve the conditions in Robeson County by lawful and constitutionally protected means.

On October 23, 1988 the Raleigh News and Observer published an editorial from the Charlotte Observer entitled "Jury's Stunning Verdict Indicts Robeson, Challenges Martin." App. B, Exh. 40.

On October 25, 1988, the Plaintiffs, except Timothy Jacobs, and more than 100 persons held a gathering to celebrate the federal acquittal. Mr. Hatcher and others, including myself, made speeches that were critical of Robeson County Sheriff Hubert Stone and his office and of District Attorney Joe Freeman Britt. This program was reported in the press. See App. B, Exhs. 42 and 43. I subsequently learned that Defendant Lee Edward Sampson of the District Attorney's Office was present and monitoring that meeting. See. App. B, Exh. 5. Thereafter, several of the Plaintiffs, under the leadership of Plaintiff Eddie Hatcher, with advice and assistance from myself and my associates at the Christic Institute South, decided to organize a petition drive to seek the removal of the Sheriff of Robeson County pursuant to N.C.G.S. § 128-16, et. seq. We drew up a Petition for the purpose. App. B, Exh. 34. We developed plans for organizing the petition drive.

On November 7, 1988, Mr. Keever Locklear, the Chief of the Tuscarora Tribe group to which Mr. Hatcher and Mr. Jacobs belong, held a supper for some 30 people to begin the petition drive. I spoke at the meeting. The plan was to obtain a large number of signatures on the petition, well in excess of the "five qualified electors" required by N.C.G.S. § 128-17. Mr. Locklear endorsed the plan and encouraged the others to participate.

On November 9, 1988, Plaintiffs held the first meeting of the coordinators for the petition drive. I participated in the meeting, together with other members of the Christic Institute South staff including Alan Gregory. Plaintiffs developed an 11 by 17 poster, and a booklet calling for support for the petition drive and arranged to distribute them. They made arrangements for Mr. Gregory to travel to Robeson County once a week to receive and try to document complaints about the Sheriff's Department. The plan was to attach these complaints to the petitions and submit them to the newly appointed District Attorney in early 1989.

A major concern expressed by everyone was a fear of physical retaliation for publicly calling for removal of Sheriff Stone and Deputy Kevin Stone. We also discussed how fear might keep people from coming forward with their complaints against the Sheriff. Mr. Gregory was justifiably fearful of being publicly known as the CIS attorney compiling these complaints in light of past events.

With these activities, Plaintiffs and their supporters, with advice and assistance from me and my staff, were exercising the most basic rights to associate, petition, and criticize public officials. Since the February 1, 1988 takeover incident, they had attracted considerable media attention and considerable support for their concerns, county, state, and nation-wide.

***

37. Mr. Warren and I met with Mr. Townsend and his administrative assistant, Mr. Martin McCall. Mr. Townsend gave the impression that he was only barely aware that Mr. Warren and I had represented Mr. Jacobs in the federal trial. He also said that he knew a little about Judge Brannon's order except that he had received a copy. Later he acknowledged some participation in its origination. He said he would insist on a plea by Mr. Jacobs to all

fourteen felony counts with no sentence recommendation. Since this was a worse offer than I felt had been broached a few days earlier on the telephone, Mr. Warren and I concluded that no reasonable offer was going to be made as long as CIS and/or Bob Warren represented Mr. Jacobs. Mr. Warren and I declined that arrangement.

Upon leaving the meeting, Mr. Warren and I ran into Mr. Ray Little Turtle. I told him the offer that Mr. Townsend had made and Mr. Little Turtle was outraged that Mr. Townsend had backed off from the terms he described in the meeting he and Ms. Brayboy had with Mr. Townsend. He confirmed that in that meeting Mr. Townsend had offered a plea to a misdemeanor and a sentence of probation.

I then telephoned my staff, advised them of the disappointing character of the meeting, and authorized them to file the complaint. They did.

38. We filed this lawsuit primarily to obtain a remedy for our clients with regard to the First and Sixth Amendment violations, and as a part of that to obtain an injunction of the state criminal prosecution. We never made any effort to use the lawsuit for plea bargaining leverage and we never believed it could have that effect. Mr. Warren and I never mentioned the lawsuit in our January 31 meeting with Mr. Townsend. We never suggested to the other attorneys who negotiated on behalf of Mr. Jacobs, including Mr. David Rudolf whom I engaged for the purpose of approaching Mr. Townsend, and Mr. James Parish, whom the Court eventually appointed to represent Mr. Jacobs and who did negotiate a plea arrangement on his behalf, that the lawsuit might be used for plea negotiation leverage. See App. B, Exhs. 17 and 18. Indeed, three months later we took a voluntary dismissal of the lawsuit without ever having made any effort to utilize it for that purpose. Had Mr. Townsend offered to dismiss the criminal prosecution against Plaintiff Timothy Jacobs in exchange for dismissal of their action, however, I am sure that Plaintiffs Timothy Jacobs and Eleanor Jacobs would have agreed to that.

***

47. On March 14, 1989, Judge William F. O'Brien signed an Order for Mr. Jacobs' extradition to North Carolina. We

immediately filed an application for stay and bail pending appeal with the New York Appellate Division.

On March 16, 1989 Mr. Jacobs called me at home in the evening and said his brother, Michael, who is in the same National Guard unit as Mr. Townsend, had gone to meet that day with Mr. Townsend in his office. Michael Jacobs reported that Mr. Townsend would not oppose reasonable bail for Mr. Jacobs if he returned voluntarily. Mr. Townsend had indicated that Mr. Jacobs' release was appropriate. Michael Jacobs further reported that Mr. Townsend urged Mr. Jacobs to return immediately so he could get the benefit of a Committed Youthful Offender sentence before his 21st birthday on July 25, 1989. Finally, Michael Jacobs reported that Mr. Townsend did not want it divulged that they had met and talked.

On Friday, March 17, 1989 or over that weekend I talked with Mr. Timothy Jacobs. He clearly was of the opinion that I was not moving to consummate the plea bargain that Ms. Brayboy and Ray Little Turtle were saying awaited him. I repeatedly advised him that we were pursuing any offer as hard as we could; we had David Rudolf calling Mr. Townsend in his behalf and we were in the background. However, I stressed that it appeared that the offers were always being made in a way to influence or induce him to return yet not be enforceable by his lawyers. This was a constant theme in our conferences. Reluctantly he changed his mind about voluntarily returning to North Carolina.

These decisions were agonizing for Mr. Jacobs because throughout he expressed his fear that he might be killed if returned and placed in the Robeson County jail. Assurances from Agent Bowman through his family that Mr. Jacobs would not be housed in the Robeson County jail exploited these fears.

On March 21, 1989 our application for stay and bail was denied by the New York Appellate Division. I immediately contacted the New York Court of Appeals and made arrangements to "fax" the appropriate legal papers overnight to attempt to halt Mr. Jacobs' extradition pending appeal. I talked with Mr. Jacobs at approximately 5:00 P.M. and he agreed with this strategy.

Then about 9:00 P.M. local counsel in New York, Alan Rosenthal, called to say Mr. Jacobs had changed his mind and did not want to seek a stay of extradition and appeal. Mr. Rosenthal

asked Mr. Jacobs to call me in twenty minutes. Mr. Jacobs never did call me even though the jailer assured me he was given my messages to call and the opportunity to do so.

I called Mr. Mancil Jacobs, Timothy Jacobs' father. He told me he felt Timothy Jacobs was being tricked and did not want him to return voluntarily. While I was on the phone with Mancil Jacobs, Michael Jacobs called me. Michael Jacobs confirmed his earlier meeting with Mr. Townsend and Mr. Townsend's promise for bail and indirect promise of Committed Youthful Offender status.

Based upon Plaintiff Timothy Jacobs' wishes, as communicated through Mr. Rosenthal, we did not pursue a stay from the New York Court of Appeals.

Based upon the inducements made by Defendants Bowman, Townsend, and Sampson, Timothy Jacobs voluntarily returned to North Carolina.

48. In the meantime, in the present case, the Attorney General's office sent copies of two pleadings to my clients, Mr. Timothy Jacobs and Ms. Eleanor Jacobs. See Plaintiffs' Motion for an Order (1) Prohibiting the State Defendants From Communicating Directly with Any of the Plaintiffs and (2) Prohibiting the State Defendants from Making Personal Attacks on Plaintiffs' Counsel.

49. On Friday, March 24, 1989, a state holiday, Judge Anthony Brannon convened a session of the Superior Court of Robeson County to conduct the first appearance of Mr. Jacobs. I arranged for Mr. Alex Charns of the North Carolina Bar to appear for Mr. Jacobs for that proceeding. App. B, Exh. 25 is a copy of the transcript of that proceeding.

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51. After Mr. Parish's appointment I spoke with him several times, offered to assist in any way possible, and smoothed out several potential misunderstandings between Mr. Parish and Mr. Jacobs.

Mr. Jacobs expressed to me his desire for me to be trial counsel with Mr. Parish if the case went to trial. Mr. Parish informed me he would be glad to have me on the trial team if no plea agreement was reached.

AFFIDAVIT OF LEWIS PITTS, CONT'D.

At no time did I suggest or recommend that this civil suit be used in any way as leverage or as a bargaining chip in negotiating a plea for Mr. Jacobs.

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[signature and notary block omitted]

NEWSPAPER ARTICLE FROM THE ROBESONIAN DATED NOVEMBER 10, 1988

SBI Investigates Conspiracy Theory

State officials say they are looking beyond Eddie Hatcher and Timothy Jacobs to determine if anyone else was involved in a conspiracy to take hostages at a Lumberton newspaper office last February.

"The basic inquiry is to look at the takeover of The Robesonian to see whether state charges are appropriate," Robeson County District Attorney Joe Freeman Britt said Wednesday.

"There are a number of complex legal issues involved in that," Britt said. "This latest move has simply been to expand that inquiry to possibly include other people. The intent there is to look beyond Hatcher and Jacobs."

Hatcher said he welcomed the conspiracy investigation, but denied that anyone other than he and Jacobs were involved in the siege. The two said they took over The Robesonian in order to spotlight what they said was corruption in the county's law enforcement community.

"I'm just itching to see them in the courthouse." Hatcher said Wednesday. "I'm not going to be intimidated by Joe Freeman Britt. He doesn't frighten me. I welcome it. But I don't see how they can talk about a conspiracy. I would have liked to have found about 10 more people to help me."

Ray M. Davis, supervisor of the State Bureau of Investigation's southeastern district, said an SBI task force is looking into the possibility that Hatcher and Jacobs may have conspired with others.

Davis said agents had been working in the county since the takeover, but that the SBI investigation had intensified recently to determine whether conspiracy charges would be appropriate in the case.

"We are responding to a request from Joe Freeman Britt and we have supplied a number of agents." Davis told The News and Observer of Raleigh, "We will report back to him. We're just trying to compile the facts. I don't want to be more specific than that."

ROBESONIAN NEWSPAPER ARTICLE, CONT'D.

Hatcher and Jacobs were cleared last month of federal weapons and hostage-taking charges stemming from the newspaper incident in which about 20 people were taken hostage.

NEWSPAPER ARTICLE FROM THE NEWS AND OBSERVER DATED NOVEMBER 10, 1988

Britt Gets SBI Probe of Conspiracy in Siege

At the reqeust of District Attorney Joe Freeman Britt, the State Bureau of Investigation is looking into the possibility that Eddie Hatcher and Timothy Bryan Jacobs may have conspired with others in the armed takeover of The Robesonian newspaper earlier this year.

Ray M. Davis, supervisor for the SBI's Southeastern District, said on Wednesday that Britt, district attorney for Robeson County, requested the SBI investigation to determine whether others had been involved in the Feb. 1 siege of the Lumberton newspaper. He said that agents had been working in the county since the takeover but that the probe had been intensified recently to determine whether conspiracy charges would be appropriate in the case.

"We are responding to a request from Joe Freeman Britt, and we have supplied a number of agents," Mr. Davis said. "We will report back to him. We're just trying to compile the facts. I don't want to be more specific than that."

Mr. Davis would not comment on specific charges that might be filed after the investigation, which involves five agents. Britt requested the investigation Tuesday.

But Mr. Britt said in a telephone interview that the investigation included others besides Mr. Hatcher and Mr. Jacobs. The two men were cleared last month of federal weapons and hostage-taking charges stemming from the incident in which about 20 people were taken hostage. Following their acquittal, Mr. Britt said he was studying whether to file state charges against the two.

"The basic inquiry is to look at the takeover of The Robesonian to see whether state charges are appropriate," Mr. Britt said. "There are a number of complex legal issues involved in that. This latest move has simply been to expand that inquiry to possibly include other people. . . . The intent there is to look beyond Hatcher and Jacobs."

Mr. Hatcher, interviewed by phone Wednesday, said he welcomed the investigation but denied that anyone other than he and Mr. Jacobs were involved. The two said they took over The

Robesonian to spotlight what they said was corruption in the county's law enforcement community.

"I'm just itching to see them in the courthouse," Mr. Hatcher said. "I'm not going to be intimidated by Joe Freeman Britt. He doesn't frighten me. I welcome it. But I don't see how they can talk about a conspiracy. I would have liked to have found about 10 more people to help me."

Mr. Britt, who will become a Superior Court Judge Jan. 1, said no charges would be filed until he reviewed a transcript of the hostage-taking trial, which he had not yet gotten from Raleigh. Also, he said, he would wait until Gov. James G. Martin had appointed his replacement as district attorney.

"I don't want to make any moves until the person who is going to try the case -- if any charges are brought -- is named," he said.

James T. Sughrue, spokesman for Gov. Martin, said the governor expected to discuss possible appointments to the district attorney's position with his legal counsel in the next 10 days or so.

P. Lewis Pitts, one of Mr. Jacob's attorneys, said any new charges in the case against anyone else in the county would be a waste of time.

AFFIDAVIT OF ALAN BRIGGS DATED AUGUST 19, 1989

[caption omitted]

The undersigned, being first duly sworn, deposes and says:

My name is Alan Briggs. I am a licensed attorney in North Carolina and have been since 1979. After my graduation from law school I worked for a period of time in Washington, D. C. as Legislative Liaison for the National Congress of American Indians. In 1978 I came back to North Carolina, passed the bar, and then accepted employment as general counsel and executive director of the North Carolina Academy of Trial Lawyers. During this time I first met Barry Nakell.

In 1986, I was hired by Attorney General Lacy H. Thornburg to be Deputy Attorney General for Policy and Planning. These duties include such functions as being legislative liaison for the Attorney General, helping to formulate Departmental policy and helping with long range planning.

On November 3, 1988, I was called into a meeting in the Attorney General's Office with the Attorney General, Barry Nakell and Lewis Pitts. Preliminary introductions were made and then the Attorney General asked about the nature of the meeting. He and Mr. Pitts had transcripts and papers which they gave the Attorney General which they represented, showed alleged law enforcement corruption in Robeson County. Nakell began complaining that the Attorney General needed to do something about the Sheriff and District Attorney because their alleged witnesses to corruption would not come forward with evidence unless they were given a deal or immunity and that the District Attorney refused to give immunity to anyone. The Attorney General pointed out he could not force the District Attorney to grant immunity. Then Nakell and Pitts began to talk about their concerns about Robeson County and make general accusations about law enforcement corruption and corruption including an unusual drug problem. In that context, Mr. Pitts aggressively demanded of the Attorney General, didn't he admit there was a special drug problem in Robeson County. The Attorney General answered there was a drug problem in Robeson County, but to his mind there was a drug problem in every part of this State, and that other counties also had serious drug problems, other counties had more serious problems than Robeson County.

Mr. Pitts loudly stated that he just can't believe you don't think there's a drug problem in Robeson County. The Attorney General rejoined that he had not said that. Mr. Pitts then stated to the Attorney General, "Well you're a liar." At that point both the Attorney General and I stood up. Mr. Nakell tried to calm all of us. The Attorney General told Mr. Pitts to leave. Mr. Nakell kept trying to calm things down. While trying to clarify his remarks, the Attorney General said part of the problem was dissension and distrust. Pitts accused him of blaming the victims. He continued to assert that there was a unique problem in Robeson County. He also accused the "Feds" of being part of the whole drug dealing scheme in Robeson County. He stated the Federal Government was heavily involved in drug activities; the drug money was used to help finance the Iran-Contra dealings; and, as a result, the "Feds" weren't investigating in Robeson County. Mr. Pitts continued to accuse the Attorney General of not being sensitive to the problems in Robeson County, and that obviously he was part of the problem. The meeting began to break up. The Attorney General continued to speak with Barry Nakell. I tried to engage Mr. Pitts in a conversation. I stated that I could not understand how he (Mr. Pitts) could come into the Attorney General's Office with all these assumptions prior to speaking with any of us. I pointed out that I was familiar with the Lumbee problems from my work with Indians as a legislative liaison to N.C.A.I. Mr. Pitts continued to assert it was obvious to him his perceptions were correct, that the Attorney General was just part of the problem. I challenged him to give specific information to back up his claims. He countered that he couldn't give specific witnesses without immunity, and that the "problem" was obvious.

Messrs. Pitts and Nakell came back to my office. I told Mr. Nakell I wanted to keep lines of communication open, but that the office needed specifics before we could do anything. Mr. Nakell attempted to assure Mr. Pitts of my sincerity. I assured them that I recognized there were problems in Robeson County but I needed more specific information for us to be able to help.

A series of telephone calls between Barry Nakell and me ensued in November and December. In the first few conversations, Mr. Nakell expressed frustration that allegedly the Assistant United States Attorney Webb had told him there would be indictments

forthcoming from the Grand Jury and that none had been returned. Mr. Nakell stated this was part of a cover up. I told Nakell I knew of a Drug Task Force which included State Bureau of Investigation agents, but didn't know anything about Webb. I do not recall ever telling Mr. Nakell that we had no special investigation going or that the agents in the County were merely the usual allotment of agents. I do not think I would have said that since I knew we had Agents specially assigned to working Robeson County with the Task Force. I did try to convey to Mr. Nakell that given our limited resources, the Bureau could not concentrate its resources on Robeson County to the exclusion of the rest of the State without hard information on events, dates, or people engaged in the alleged trafficking. We discussed the "Catch 22" of witnesses not forthcoming and that, without more new information, it was hard for me to suggest what we could do.

On another occasion, Mr. Nakell called to describe a problem about the use of public school facilities for public meetings in Robeson County. I stated I would convey that to the Attorney General, but knew of no authority the office could exercise over local public officials. Mr. Nakell acknowledged to me the lack of jurisdiction, but said that the Attorney General could speak out to local officials to let them know of his concern and, that as a public official, he could focus attention on Robeson County problems.

At some point in these conversations I communicated to Mr. Nakell that Pitts was persona non grata at the office, but that Mr. Nakell was still in good standing. I also talked about what the Office could do. I talked about limits of control and authority. I pointed out that, in our first conversations, he had complained about Bureau agents making statements to the press, that I had taken steps to prevent any further comment, and that the comments stopped. I pointed out that I had conveyed his concerns about agents being involved in wrongdoing to the Bureau to investigate. Mr. Nakell and I then talked about the Attorney General's ability to speak out in the press on issues even if he had no authority. I pointed out to Nakell that such a step might not be helpful given the hostility to outsiders to Robeson County. He agreed that such a public posture could hurt as well as help the goal Mr. Nakell was seeking to achieve, but still urged me to convey this to the Attorney General.

Finally, we talked about whether this office should convene a Task Force to look at Robeson County or whether we should participate with the Governor's Task Force. Mr. Nakell told me the Governor's Task Force was a good vehicle, had been helpful, and that the Attorney General's Office should simply participate with that Task Force. I called Phil Kirk on Mr. Nakell's behalf to inquire as to whether the Task Force was still active. Mr. Kirk told me it was, but that they were waiting for Mr. Nakell and Mr. Pitts to take the next step because these attorneys had postponed the last several meetings called to hear their evidence. Mr. Kirk felt the Task Force was limited due to the general nature of the claims, but that the Task Force was still organized and still willing to investigate, but was frustrated that they had not met in several months and wondered if Mr. Nakell and Mr. Pitts still wanted to meet. I told Mr. Nakell this information. He stated he would get with Secretary Kirk. He stated the Attorney General's Office should hold off doing anything until the Task Force had a chance to work.

On one occasion Mr. Nakell called me complaining abut the agents speaking to Indian activists during the conspiracy investigation, and allegedly asking these persons about meetings and with whom they had spoken. Mr. Nakell was concerned that this was intimidating legitimate activity. I pointed out to Mr. Nakell that the nature of the crime of conspiracy required that type of questioning and questioning the known associates of the perpetrators of the substantive offense. He acknowledged this to be true and agreed it was hard to draw the line between legitimate investigation and harassment in such cases. He again expressed his concern that it was chilling activists in Robeson. I agreed to pas along these concerns to the Attorney General. The Attorney General told me to pass all information concerning alleged misconduct by the agents to Robert Morgan.

The last time I spoke with Mr. Nakell was on or about the time the Attorney General wrote Mr. Nakell to tell him the office believed the Bureau Agents had done nothing improper. I called Nakell and told him my intent was to be candid and frank. I stated that in absence of any specific information, nothing further could be expected from the office, and that our continued conversations were unlikely to be fruitful. The Attorney General felt there was nothing more the office could do for him and was feeling frus-

trated. I told him the Attorney General had directed that all matters concerning the State Bureau of Investigation were to be handled by the Director, Robert Morgan. I also told him my honest assessment of the internal politics of the office were that, because of my work with the North Carolina Academy of Trial Lawyers I did not have good contacts with the State Bureau of Investigation; my duties didn't involve such communication with the State Bureau of Investigation; and that there was nothing more I could do to help with specific complaints about Bureau Agents. I urged Nakell to talk to Robert Morgan directly since the Attorney General had directed that Senator Morgan was to handle all information on this subject. I am certain I expressed sympathy and concern for the problems of Robeson County. On at least one occasion I had expressed to Nakell concern that Bureau Agents had commented in the news media, and agreed to work to stop it. I do not recall telling him that there was merit otherwise to his claims of unlawful or improper behavior by the Agents or local officials. I do not recall telling him that Senator Morgan had foreclosed anything for political reasons. I did tell him no further good was to be achieved from our conversations and interoffice politics dictated any further complaints should go to the Bureau's Director. I have no recollection of using the term "Willie Horton syndrome" to describe the decision making process of the office.

During my series of conversations with Mr. Nakell, or the meeting with Mr. Nakell and Mr. Pitts, I was never asked whether Joe Freeman Britt or Sheriff Stone were "political allies" of Judge Thornburg. It was never stated in my presence that these men were close political allies of Judge Thornburg. Judge Thornburg described Sheriff Stone simply as a supporter during the meeting with Mr. Pitts and Mr. Nakell when Mr. Nakell said that he thought Sheriff Stone was a supporter of Thornburg and Thornburg agreed.

Further this affiant sayeth not.

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AFFIDAVIT OF LACY H. THORNBURG
DATED MARCH 30, 1989

[caption omitted]

The undersigned first being duly sworn, deposes and says:

My name is Lacy H. Thornburg and I am the duly elected Attorney General of North Carolina, and have been since January 1, 1985.

On February 1, 1988 I learned of the take over of "the Robesonian Newspaper" by John Edward Clark aka Eddie Hatcher and Timothy Jacobs and of their holding the employees of the Robesonian at gunpoint. I spoke briefly with Governor Martin concerning the situation and advised him that any agreement made under duress was not binding. I had no other contact with the Governor concerning what agreement, if any, he had authority to make or should make with the kidnappers. Specifically, I never entered into an agreement with Governor Martin and/or Joe Freeman Britt, and/or the United States Attorney on February 1, 1988 or any time thereafter that Hatcher and Jacobs would not be tried in State Court. Only Joe Freeman Britt, the duly elected District Attorney, could have made that type of commitment to Jacobs and Hatcher. I do not possess the statutory authority to make a binding commitment that a person will not be tried in State Court. At most I can approve a District Attorney's determination to grant immunity. Article 61 Chapter 15A, North Carolina General Statutes. I knew these limitations of authority when I spoke with the Governor on February 1, 1988.

In Paragraph 33 of the First Amended Complaint, the plaintiffs allege "on information and belief, in response to the lawful, constitutionally protected activities of plaintiffs, defendants Joe Freeman Britt, Hubert Stone, Lee Edward Sampson, Lacy Thornburg, Robert Morgan, James Bowman, and the District Attorney Does, the Deputy Sheriff Does and the SBI Does, or any two of them, conspired and agreed among and/or between themselves and diverse others to conduct a campaign of intimidation and harrassment against plaintiffs and plaintiffs' supporters and/or sympathizers." That statement is false as it relates to me, and to the best of my knowledge is false as to the other defendants, especially those for whom I have supervisory

authority (Robert Morgan, James Bowman and any other SBI Agents).

I have never expressly or tacitly agreed or conspired with anyone to harass or intimidate the plaintiffs or their sympathizers. I did not communicate with the District Attorney's office concerning their decision to charge Hatcher and Jacobs with fourteen counts of second degree kidnapping. I did not recommend any candidate to the Governor for District Attorney and did not directly supervise the SBI background checks on the candidates which were requested by the Governor's Office.

I have had no direct contact with the Agents handling the investigation of the events arising from the February 1, 1988 kidnapping. I have no reason to believe Agent Bowman or any other Agents conducted the investigation of possible conspiracy or obstruction of justice charges in an improper or illegal manner. I certainly have never approved, acquiesced in, tacitly authorized, or was deliberately indifferent to any illegal conduct by anyone under my authority in connection with the investigation of the pending State charges against Eddie Hatcher and Timothy Jacobs or the investigation of possible conspiracy or obstruction of justice charges arising from the February 1, 1988 incident. Complaints concerning alleged conduct by Sheriff Stone and his employees and Joe Freeman Britt were addressed to me by Barry Nakell and Lewis Pitts. I explained to Mr. Nakell and Mr. Pitts that I had no authority to force the Sheriff or the District Attorney to act as they desired. Through Deputy Attorney General Alan Briggs, Mr. Nakell also communicated to me his displeasure with the way in which the Agents were conducting the investigation, but would give Mr. Briggs no specific information about how the Agents' conduct could be considered illegal or improper except that they were questioning alleged Indian activists and this upset the Indian activists. He also complained about State Bureau of Investigation Agents being quoted in the media concerning the pending investigation. These vague complaints did not indicate to me unlawful conduct on the part of the agents. As Attorney General I have no statutory or common law supervisory authority over the actions of Joe Freeman Britt, Lee Edward Sampson, Sheriff Hubert Stone, or the Deputy Sheriff and District Attorney "Does". I so informed Mr. Nakell on several occasions personally and through

Deputy Alan Briggs on at least one other occasion of this limitation of authority.

To my knowledge there is and has been no conspiracy to harass and intimidate Plaintiffs and their sympathizers and I have not agreed to attempt to cover up any such conspiracy. I have no reason to believe any such conspiracy exists.

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LETTER FROM BARRY NAKELL TO LACY THORNBURG DATED NOVEMBER 11, 1988

[date and inside address omitted]

Yesterday's issue of the Raleigh News & Observer reported that Ray M. Davis, supervisor for the SBI's Southeastern District, said that the SBI had five agents in the field investigating whether Mr. Hatcher and Mr. Jacobs may have conspired with others in the takeover of the Robesonian. It further reported that Mr. Davis said that District Attorney Joe Freeman Britt "requested the SBI investigation to determine whether others had been involved in the Feb. 1 siege of the Lumberton newspaper. He said that agents had been working in the county since the takeover but that the probe had been intensified recently to determine whether conspiracy charges would be appropriate in the case."

An N & O reporter, Michael Haddigan, advised me yesterday afternoon that another reporter informed him that a reliable source had told that reporter that the attorneys at the Christic Institute were targets of the conspiracy investigation. Mr. Haddigan told me he did not know whether the source of this information was a law enforcement authority.

Today's N & O has a story over Mr. Haddigan's byline headlined "SBI expands inquiry of siege at newspaper". The first paragraph reports: "The State Bureau of Investigation has expanded its probe of the takeover of the The Robesonian newspaper to consider whether obstruction of justice has taken place in the case, Robeson County District Attorney Joe Freeman Britt said Thursday." The story quotes Mr. Britt as follows: "'The investigation here has taken another turn and has now been expanded to include the possibility of obstruction of justice charges and interference with state witnesses charges," Mr. Britt said. He declined to comment further."

To his credit, Mr. Haddigan did not mention the possible "leak" about the Christic Institute staff in today's story. He did, however, report that "(t)he executive director of the Robeson County Human Relations and Unity Commission said Thursday that a SBI agent had interviewed her as part of the expanded investigation. Roxanne F. Hunt of Pembroke said that the SBI agent asked her

about a meeting last Thursday between commission members and newspaper employees, most of whom were former hostages."

You should be aware that there is a climate of fear and intimidation in Robeson County. That climate artificially restrains legitimate political activity within the Indian and black communities. Mr. Britt is probably the person principally responsible for that climate in recent years. He has frequently fueled the fear by abusing his position to intimidate citizens from expressing positions in opposition to his or those he supports. There are many people in a better position to inform you about this situation than I, but I would like to call your attention to the enclosed letter that I wrote to the Bar Grievance Committee describing two incidents that occurred at the Zabitosky inquest. The letter refers to "a series of lesser incidents" also. Those incidents included wholly unnecessary personal attacks on witnesses called by me on behalf of the Zabitosky family to testify about matters that were not in dispute just because they had the audacity to come forward in support of the other side and, I might add, wholly unwarranted personal attacks on me. I would welcome an opportunity to discuss this situation with you in further detail, but I think the foregoing suffices for the present time, especially because I am sure you are already well aware of this situation.

I would also like you to know that the Christic Institute staff has been helping Indian and black and some white residents of Robeson County organize to lift the conditions of oppression that characterize their community. Indeed, they held two very successful meetings there just in the last week before these statements were made to the press.

During the ten days or so before February 1 after Mr. Hatcher received the information John D. Hunt he sought and received help from many people in his effort to evaluate the information, to hide the documents, to disclose the information to the proper authorities, and to protect himself from the serious danger he perceived to his life. Some of those people testified as defense witnesses at the federal trial about their experiences with Mr. Hatcher in those critical days. It is also well known that the people who helped Mr. Hatcher during that time included the Christic Institute staff. Back in April AUSA John Bruce asked me about

their involvement and I discussed it with him. At the trial, Bob Warren, as Mr. Jacobs' attorney, brought out some information about his own involvement. The Christic Institute staff have freely discussed their involvement, subject to the attorney-client privilege limitations. Mr. Pitts recently was interviewed by Bob Horne on the subject for the book that Mr. Horne is writing. Had Mr. Hatcher testified at the federal trial, which he did not because he was denied his right to trial counsel of choice, he would have discussed his meetings with the Christic Institute staff.

Many of the people who helped Mr. Hatcher then are today involved in the legitimate protest activities underway in Robeson County. Not surprisingly, many of them are playing leadership roles in those activities. As mentioned above, those include the Christic Institute staff.

I understand the need for legitimate inquiry into the activities of the people who met with Mr. Hatcher during the days leading to February 1. I thought that was done months ago and question seriously the revival of that inquiry at this time, but I do not quarrel with it if it is undertaken for legitimate purposes.

I cannot, however, understand why Mr. Britt and Mr. Davis would tell newspaper reporters at this time that Mr. Britt has asked the SBI "intensify" its investigation by including conspiracy charges and then to "expand" its investigation by including obstruction of justice and interference with state witnesses charges, and that the SBI has done so. I also cannot understand why anyone would leak, if anyone did, that the Christic Institute staff is a target of the "conspiracy" investigation.

I had understood that the general policy of the SBI was not to comment on an ongoing investigation. I had understood that was why we were unable to receive the information we have requested regarding the investigation, if any, of major drug dealing and associated violence and corruption in Robeson County. I assume that is the reason that today's N & O story concludes : "Kuyler Windham, SBI assistant director, declined to comment on the expansion of the investigation," and contains no other comment by the SBI, only by Mr. Britt.

I am sure you understand the seriousness of law enforcement officers too freely brandishing allegations of conspiracy or even "conspiracy investigation" to the press, especially when the

allegations are broadsides and especially when those broad allegations may be understood to threaten citizens engaged in lawful and protected political action that might be unpopular with elected and especially law enforcement officials. Given the history of the use of such tactics of intimidation against legitimate action by Indian and black residents of Robeson County, this situation may have a particularly menacing significance.

The concern here, obviously, is whether Mr. Britt has asked for these "intensified" and "expanded" investigations, and whether the SBI has agreed to undertake them and Mr. Davis, in witting or unwitting support of Mr. Britt, announced the "conspiracy" investigation to the press, in an effort to frighten or intimidate citizens who are now working with Mr. Hatcher in legitimate, constitutionally protected political protest activities or those working independently in support of such efforts. The concern is also whether the purpose is to discredit them, their associates and friends, including the Christic Institute staff, and their cause by innuendo. The concern is also whether the purpose is to frighten people, including even the Robeson County Human Relations and Unity Commission, from engaging in constitutionally protected meetings and other associational activity.

I would ask you to investigate the report attributed to Mr. Davis and the reported leak. I would also ask you to investigate the conduct of Mr. Britt to determine whether it is designed to interfere with the constitutionally protected rights of the Indian and black citizens of Robeson County. I am sure that you are as interested as I in ensuring that law enforcement officials not abuse their authority by improperly and unnecessarily intimidating citizens seeking to exercise their very important constitutional rights to assure that their government treats them fairly and equally in all respects.

I hope you can reassure me that the concerns I have expressed in this letter are unwarranted. If you find reason for those concerns, though, I am confident you will take appropriate action.

Thank you very much for your prompt attention to this potentially alarming situation.

With all good wishes.

[signature omitted]

LETTER FROM BARRY NAKELL TO LACY THORNBURG DATED DECEMBER 13, 1988

[date and inside address omitted]

I am writing to follow up on my letter of November 11, 1988.

I. After the federal acquittal, the Robeson Defense Committee held a meeting at West Robeson High School. This meeting was held at that site in accordance with the established policy of the Robeson County Board of Education.

Thereafter, West Robeson High School was scheduled to host a basketball competition with a traditional rival, on Tuesday, November 22, 1988. In the past, the game between these two teams had been the occasion for some difficulties among the fans, so the high school administration was particularly concerned about security for this event. The high school generally relies for security on Sheriff's Deputies. As I understand it, the Sheriff's Department assigns one Deputy and the high school hires another Deputy off duty to provide security for its basketball games.

On this occasion, the Sheriff's Deputies refused to work at the basketball game. First a desk officer and later other officers told the school authorities that the reason was that the high school had allowed the Robeson Defense Committee to hold a meeting in its facilities at which speakers had criticized the Sheriff's Department. As a result, the high school had no security officers at the game, in violation of rules, and the administration was extremely apprehensive about the situation. Fortunately, the fans caused no trouble and the evening was uneventful. The important fact, however, is that Sheriff's Deputies refused to carry out their law enforcement function in order to penalize the high school for allowing the Robeson Defense Committee to hold a meeting on its premises, even though the school board policy and the First Amendment to the Constitution required the high school to do so. Thus, the Sheriff's Deputies tried to force the high school to violate the school board policy and the Constitution in the future by wrongfully refusing to make the school facilities available to the Robeson Defense Committee on the same terms and conditions as other community groups simply because the officers did not like the views being expressed at their meetings.

On Tuesday, December 6, 1988, the Fairgrove School in Fairmont did capitulate to this pressure and refuse to allow the Robeson Defense Committee to use the school for a meeting. As I understand it, the Local Advisory Council, a lay group, refused to approve the building use by the Committee, although the principal wanted to allow the use.

The Robeson Defense Committee had another event scheduled for Friday, December 9, 1988, a banquet to be held at the high school to honor the attorneys in the federal trial. They sold almost 300 advance tickets in anticipation of the event. The Local Advisory Council tried to cancel the permission for the building use. The principal asked the central office to allow the building use. With the Superintendent out of town, the Chairman of the School Board did approve it, but the Robeson Defense Committee did not learn for sure until 4:00 on the day of the event that they would be allowed to use the high school building.

I have confirmed these fact, including the conversations with the Sheriff's Deputies, with the Chairman of the Robeson County School Board, Mr. Dalton Brooks; the Superintendent of the Robeson County Schools, Mr. Purnell Sweatt; and the Principal of West Robeson High School, Mr. Ray Oxendine.

II. I understand that some SBI agents have been conducting their "investigation" in a manner designed more to intimidate citizens than to discover evidence of crime. For example, agents have interrogated Indians in the community about their political associations and beliefs, including seeking membership lists of community organizations and asking citizens questions such as whether they "support Eddie". In addition, they have been engaging in apparently purposeless interviews, asking repeatedly of different citizens for addresses of persons whose addresses the agents already know. According to Ms. Connie Brayboy, editor of the Carolina Indian Voice, SBI Agent James Bowman visited her office on Monday, December 12, 1988, and asked her such questions as why she did not attend the banquet on Friday night and why Ms. Ashaki Binati was not there. In that context:

III. After Mr. Hatcher and Mr. Jacobs were indicted on December 6, 1988, several newspapers quoted SBI Agent James Bowman as saying that further indictments for conspiracy and obstruction of justice would be forthcoming. I understand from

Mr. Briggs that you have already taken steps to stop the SBI from such improper action that has a highly intimidating effect in the climate in Robeson County described in my letter of November 11.

I would like you to know that on December 7, 1988, I met with Assistant Robeson County District Attorney Richard Townsend in his office in the presence of SBI Agent James Bowman and two or three other members of the District Attorney's staff. During that meeting, I asked Mr. Townsend whether any further indictments were contemplated, specifically including the indictments for conspiracy and obstruction of justice. Mr. Townsend advised me that the Grand Jury had met the day before from about 9:30 a.m. to about 12:30 p.m. when it returned the indictments of Mr. Hatcher and Mr. Jacobs, that it then retired, and that it was not scheduled to return. He further advised me that I would have to ask "Joe" about any future plans to the call the Grand Jury back, that Mr. Britt was handling the case but was in Chapel Hill for a training program for new judges, and that he was just filling in for Mr. Britt that day. Agent Bowman sat silently listening to that entire conversation. It was only later that I read the newspaper accounts and learned that Agent Bowman was the one who had reportedly been telling the media about the conspiracy and obstruction of justice indictments. I had to wonder why he was willing to talk freely to the press about those plans but did not tell me about them when I expressly inquired about them. Was it because the purpose was one of intimidation, which could be accomplished by circulating the reports in the newspapers but not to the attorney?

IV. I appreciate your efforts to stop this improper activity. I am afraid they come too late. The apparent campaign of intimidation has been successful. People in the community are frightened.

Accordingly, I request that you transfer Mr. Bowman away from Robeson County. That is the only action that can begin to correct the situation of improper intimidation. It is also the first action that should be taken to begin to restore the confidence of the community in law enforcement. In light of my letter of November 11 to you and your previous advice to the SBI on this matter, there is no justification for this repetition of the use of the press for apparent intimidation, though this time by a different agent. As you have been aware at least since February 1, there has long been

considerable community distrust of this agent and this kind of conduct serves only to confirm that feeling as well as to contribute to the unhealthy climate of fear. It is not enough for you privately to act to prevent a recurrence of this incident, or even publicly to make your disapproval known. In the context of the entire situation, it is necessary that Mr. Bowman be replaced in the Robeson County area with an agent who can attempt to command the confidence of the entire community, as difficult as that will be given the history and the other aspects of the current situation. This is only a first step, but in light of all the circumstances at this stage, I have come to the conclusion that it is a minimally necessary first step to demonstrate your responsiveness to legitimate concerns of the Indian community.

V. I would also like to request that you investigate the refusal of the Sheriff's Department to carry out its law enforcement responsibilities on Tuesday, November 22. I hope you will be able to identify the officers involved, determine the extent to which the Sheriff himself participated or tried to prevent the punitive withholding of law enforcement services, ascertain whether any violation of laws or duties was involved, and take all appropriate corrective measures, including recommending any disciplinary measures that the Sheriff's Department or District Attorney should take.

VI. I would greatly appreciate it if you would advise me of the status of you investigation, if any, in response to my letter of November 11

VII. I have asked Mr. Briggs to provide me information with regard to the arrests in Robeson County for which the SBI has been responsible, in whole or in part, since January of 1985. I told him that I was particularly interested in homicide and drug cases and that I would like the names of the defendants arrested, the case numbers and any further information available about the nature and progress of the cases. I assure him that I was interested only in non-confidential information. I trust that I could gather this information from court records, but I hope that your office would be able to assist my search to the extent possible. Mr. Briggs readily agreed to furnish me such information as was available, though he was not then sure of what form it might take and whether it would be as individual as I would like or merely

statistical. I assume, however, that the SBI keeps records of the arrests it makes and the kind of public information about the cases that I seek. I appreciate your help in this respect.

I look forward to hearing from you as soon as possible.

[signature omitted]

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AFFIDAVIT OF HUBERT STONE DATED JUNE 29, 1989

[caption omitted]

I. HUBERT STONE, do hereby swear and attest as follows:

1. I am the duly elected Sheriff of Robeson County, North Carolina.

2. Prior to October 25, 1988 (see Paragraph 41 of the Amended Complaint), the Robeson County Sheriff's Department had stopped providing security personnel for Robeson County high school functions and sporting events.

3. That prior to October 25, 1988, Robeson County high schools had begun independently contracting with off-duty deputies of the Robeson County Sheriff's Department to provide one or two persons for security at after-school functions and sporting events, and these contracts with off-duty Sheriff's deputies did not involve any policy or authority of Robeson County or the Robeson County Sheriff's Department.

4. My first knowledge of a problem concerning security at a West Robeson High School basketball game subsequent to an October 25, 1988 meeting of the Robeson Defense Committee held at West Robeson High School was a telephone conversation with West Robeson High School principal Ray Oxendine. The conversation occurred within a day to a few days after a Tuesday night basketball game which is apparently the subject of Paragraph 42 of the Plaintiffs' Amended Complaint. In that conversation, Ray Oxendine informed me that two deputies with whom he had contracted for security at the basketball game had failed to show or cover the basketball game, and he had heard indirectly that it was the result of disgruntlement over the Robeson Defense Committee meeting which was held on October 25, 1988 at West Robeson High School.

5. I advised Mr. Oxendine that there had been a late meeting at the Sheriff's Department involving all personnel and deputies on the night of the West Robeson High School basketball game, which meeting terminated at approximately 7:30 p.m., but that I was unaware of any problem with the deputies who had contracted for security at the West Robeson High School basketball game, or whether their failure to appear was the result of disgruntlement over the Robeson Defense Committee meeting of October 25,

1988. I advised Mr. Oxendine that I would talk with the deputies who had contracted with West Robeson High School for security at basketball games, to ensure that there would be no lapse or other problems with their security service at school functions.

6. I received no further complaints from any schools or public institutions concerning problems related to the allegations contained in Plaintiffs' Complaint or Amended Complaint, and I was never contacted by any of the plaintiffs' attorneys or their offices concerning any of the allegations contained in this action.

[signature and notary block omitted]

PORTION OF NEWSPAPER ARTICLE FROM THE ROBESONIAN DATED DECEMBER 7, 1988

* * *

"It is not technically double jeopardy, since hostage-taking and kidnapping are separate charges, but they are punishing them twice, or trying to, for the same offense," said Kunstler, who intends to represent Hatcher on the state charges. "This is an ugly, vindictive prosecution designed to punish them for being acquitted."

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PORTIONS OF NEWSPAPER ARTICLE FROM THE LEADER DATED APRIL 13, 1989

* * *

It was an icy December day when Pitts and his co-workers assembled in their Carrboro headquarters for an interview. We sat in the cluttered, paper-strewn Carrboro office where news clippings and a picture of Frederick Douglass, the Civil War-era black abolitionist, decorated the walls and a slow-moving cat held the room free of evil spirits. Their mood was grim. The state indictments had been announced a few days previously, Hatcher had been re-arrested and was sitting in jail, and Jacobs had escaped to the Onondaga Nation reservation in upstate New York, from which he had called a Raleigh television station and sworn never to return to North Carolina. Hatcher's bond, even though reduced by a Lumberton judge from $140,000 to $25,000, was proving hard to secure, and Pitts had finally turned to the National Council of Churches, from which he was awaiting a check as we spoke.

The disappointment over this turn of events was palpable. While admitting that the state charges technically did not constitute double jeopardy, each of the four young staffers -- Pitts, his fellow attorneys Gayle Korotkin and Alan Gregory, and development officer Ashaki Binta -- viewed the state's action as dubious at best and a serious handicap to their efforts in the county. The state's action, they charged, was a bad-faith prosecution motivated largely by a petition drive to remove Sheriff Stone and his son and deputy, Kevin Stone, from office. Earlier in the year, the CIS staffers had researched the petition and recommended it to concerned citizens in the county.

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AFFIDAVIT OF CHARLES BRYANT
DATED AUGUST 18, 1989

[caption omitted]

Charles Bryant being first duly sworn, deposes and says:

I am Charles Bryant. I serve as Police Chief at Pembroke State University, and have so served for the past nine (9) years. I have served in lesser capacities with the Department since 1965.

I told the State Bureau of Investigation Agents that my wife worked with Eddie Hatcher while both worked for the Tuscarora Tribe. I further was asked by the Agents that Mr. Hatcher had made several long distance collect telephone calls to my house. My wife accepted the calls. I voluntarily told the Agents about the phone calls. The Agents did not broach the subject to me. I gave the Agents directions to my house in case the Agents wished to speak with my wife concerning the calls. To my knowledge, the Agents never did so.

The Agents and I discussed the fact that some students had reported, within the past few weeks, seeing Eddie Hatcher on the campus with a shotgun in his vehicle. I told the Agents that I had received this same information. However, we had received no complaints from any student. I also told the Agents that my officers and I would treat Mr. Hatcher just like anybody else. I did not feel the Agents were accusing me of allowing Hatcher to bring a gun on campus.

The Agents asked me for directions to Mr. Keever Locklear's house. At no time did the Agents ask for or make any mention of Mr. Locklear's tribal rolls, or any other tribal information. The meeting was friendly. I did not feel threatened or intimidated by the Agents.

Sometime in May, 1989, Barry Nakell from Chapel Hill came to speak with me. I had never before spoken about my meeting with the Agents to Mr. Nakell, nor, to my knowledge, to anyone acting on his behalf. I have never spoken to Mr. Pitts concerning these matters. Mr. Nakell and I met in my office at Pembroke State University. We discussed my meeting with Agents from the State Bureau of Investigation regarding Eddie Hatcher and Hatcher's activities on campus before 1 February 1988. Mr. Nakell made handwritten notes in my presence. On 2 August

1989, a black male with a goatee whose name I do not remember, came to my office with a typed affidavit. I quickly read over it, and it appeared to be basically what I had told Mr. Nakell, although not in my words. I signed the affidavit.

On 17 August 1989, State Bureau of Investigation Agent James Bowman met me in my office on campus and showed me a copy of my 2 August affidavit. A copy of that affidavit is attached as Exhibit A. I read the affidavit. I was surprised that the affidavit stated that the Agents had requested me to get copies of Keever Locklear's tribal rolls. The Agents never did so, and I never so stated to Mr. Nakell. Also, the words in the affidavit seem to imply that my meeting with the Agents was intimidating and less than cordial. This was not the case. The affidavit also seemed to imply that the Agents sought information concerning my and my wife's political activities. At no time did the Agents make any such inquiries, directly or otherwise.

Further this affiant sayeth not.

[signature and notary block omitted]

AFFIDAVIT OF JAMES BOWMAN
DATED MARCH 30, 1989

[caption omitted]

The undersigned first being duly sworn, deposes and says:

My name is James Bowman. I am an Agent of the State Bureau of Investigation, a statewide law enforcement agency which is a part of the North Carolina Department of Justice. Since 1986 I have been stationed in Robeson County, North Carolina. On February 1, 1988 Timothy Jacobs and John Edward Clark, aka Eddie Hatcher, took over the Robesonian Newspaper at shotgun point and held the employees hostage. I became the State Bureau of Investigation Agent primarily responsible for investigating the crimes arising from this incident.

Paragraph 33 of the Amended Complaint alleges that:

> "in response to the lawful, constitutionally protected activities of Plaintiffs, Defendants Joe Freeman Britt, Hubert Stone, Lee Edward Sampson, Lacy Thornburg, Robert Morgan, James Bowman, and the District Attorney Does, the Deputy Sheriff Does and the SBI Does, or any two of them, conspired and agreed among and/or between themselves and diverse others to conduct a campaign of intimidation and harassment against Plaintiffs and Plaintiffs' supporters..."

This statement is false as to me, and to the best of my knowledge, as to any of the others named. I have never conspired with or tacitly or expressly agreed with anyone to conduct a campaign of intimidation and harassment against the Plaintiffs and Plaintiffs' supporters.

After the Federal trial, pursuant to the request of the District Attorney, I investigated the kidnappings by Timothy Jacobs and Eddie Hatcher on February 1, 1988. Along with several other Agents I reinterviewed the kidnap victims. After several of these victims reported feeling pressured by persons representing themselves to be members of a "Human Relations Committee" not to participate in a State trial of Hatcher and Jacobs, the State Bureau of Investigation, pursuant to the District Attorney's request, looked into possible obstruction of justice charges. On the basis of testimony in the Federal trial concerning Hatcher's meeting with

certain people just prior to the events of February 1, 1988, the District Attorney requested that I and several other agents investigate the possibility of a conspiracy. At no time did I, or to my knowledge, the other agents question potential witnesses during this investigation in a manner designed by me or the others to intimidate or frighten anyone from exercising legal rights. I have not questioned anyone during this investigation for other than a valid criminal investigatory purpose. The attorneys for Timothy Jacobs were never targeted for investigation by Joe Freeman Britt or the SBI or mentioned by me or, to my knowledge the other agents to the potential witnesses as possible suspects, during our investigation of this incident.

In the course of the investigation I did not, and to my knowledge the other agents did not, interview any of the named plaintiffs in this case. I and another agent spoke with Mrs. Eleanor Jacobs at her home, but not concerning any pending or contemplated charges. Rather, the conversation was intended as a courtesy to reassure her that we would not harm her son. This conversation was initiated due to the published allegations by a Christic Institute Attorney, Alan Gregory, that I and the other Agents were using Gestapo tactics. See Exhibit 1.

I have not represented false or misleading information to the press. I have not made any statement to the press with the intent to frighten or intimidate anyone or otherwise to suppress anyone's First Amendment rights.

Paragraph 40 of the Amended Complaint alleges in part that:

> "Lee Edward Sampson, James Bowman and Richard Townsend, under the direction, control and/or supervision of Defendants Joe Freeman Britt and Richard Townsend, did approach the family and friends of Plaintiff Timothy Jacobs, without notice to said Plaintiff's counsel, and requested that certain information...be communicated to Plaintiff Jacobs on their behalf."

I was never directed by either Joe Freeman Britt or Richard Townsend to approach Jacobs' friends or family to convey information to Timothy Jacobs.

After the indictments were returned, I spoke with an acquaintance of Jacobs concerning the investigation. That person volunteered to me that in that person's opinion Eddie Hatcher was

trying to make the situation a media event and that Timothy Jacobs wanted to come home and cooperate but that Lewis Pitts was not wanting Timothy to come home. I did not initiate this area of conversation nor did I suggest what Jacobs should do concerning Lewis Pitts.

On December 21, 1988 the Robesonian Newspaper published an interview with Timothy Jacobs stating Hatcher had ruined his life. See Exhibit 2.

On December 22, 1988, in response to that article and in response to the earlier article in which in which I and the other agents were described as using Gestapo tactics, I went to visit Jacobs' parents, along with another agent, to reassure them that Timothy Jacobs would be professionally treated when and if he was brought back to North Carolina by the Bureau Agents. Mrs. Jacobs followed me and the other agent out to my vehicle and expressed concerns about Timothy being housed in the Robeson County Jail if he came back. She stated he was afraid of being housed there. I promised her that I would check with the Sheriff's Department to see if he could be housed elsewhere. I did not initiate any conversation with the Jacobs concerning attorneys or what Timothy Jacobs should do.

I contacted Jimmy Maynor, a native American and the Chief of Detectives for the Robeson County Sheriff's Department pursuant to my commitment to Mrs. Jacobs. Deputy Maynor assured me that Jacobs could be housed in a facility other than the Robeson County Jail if he returned. He suggested either the Scotland County or Cumberland County facility as an alternative place to house Timothy Jacobs.

I then recontacted the Jacobs' to inform them the Sheriff's Department had no problem with Timothy Jacobs being housed in a facility, other than the Robeson County jail.

I went to the Jacobs' residence the morning of December 29, 1988 to convey the information I had received from Detective Maynor, but did not speak with Timothy Jacobs' parents. My best recollection is that I left a message that I would call later. Later that day I called Mrs. Jacobs and told her of Detective Maynor's agreeing that Timothy Jacobs could be held in another facility. I also told her that if Timothy Jacobs came back on his own, evidencing good faith, that I would recommend to the Magistrate

and/or the Judge that he receive an unsecured bond, but that I could not promise that he would receive one. I stated even if he fought extradition I would still try to get him housed in a jail other than Robeson County and would not hold his decision concerning extradition against him. I never told Mrs. Jacobs that Timothy should get local lawyers or not retain the Christic lawyers. I never told Mrs. Jacobs the Christic lawyers were not representing his best interests. I told Mrs. Jacobs I wished Timothy Jacobs had advice from local people as well as the people in New York. I expressed my opinion concerning media hungry people, but did not identify these people as the Christic attorneys. I did not tell Mrs. Jacobs to tell Timothy to speak with local attorneys, or to discharge any attorneys, or to waive extradition. The only thing I asked the parents to tell Timothy Jacobs was that he would not be housed in the Robeson County jail if he came back on his own and that I would attempt to help him obtain an unsecured bond under those circumstances. When specifically asked by Mrs. Jacobs about Timothy possibly testifying against "Eddie", I stated in response to her question that I would like Timothy to testify against Eddie. At the time I spoke with Mrs. Jacobs I knew that Timothy Jacobs did not have lawyers of record for the North Carolina charges and that Lewis Pitts was not licensed to practice in North Carolina. In my conversations with the parents I stressed on more than one occasion that Timothy needed to make his own decisions concerning what to do. I never told them to tell him what to do.

To my knowledge there is and has been no conspiracy to harass and intimidate Plaintiffs and their sympathizers. I have not agreed to cover up any such conspiracy. I have no reason to believe any such conspiracy exists.

This the 30 day of March, 1989.

[signature and notary block omitted]

EXHIBIT 2 TO AFFIDAVIT OF JAMES BOWMAN ARTICLE FROM THE ROBESONIAN DATED DECEMBER 21, 1988

Remorseful Jacobs: Hatcher 'has just destroyed me'

EDITOR'S NOTE: Eddie Hatcher and Timothy Jacobs were acquitted of federal hostage-taking and firearms charges Oct. 14 for a Feb. 1 takeover of the Robesonian, when up to 20 people were held for ten hours at gunpoint. On December 8, a grand jury returned indictments for 14 counts of second-degree state kidnapping charges on each man. Hatcher was arrested that day and Jacobs fled to the Onondaga Indian Nation reservation near Syracuse, N.Y. Jacobs was captured after a high-speed chase and wreck Dec. 13 and is now fighting extradiction to North Carolina on the kidnapping charges. After being released on bond, Hatcher fled Robeson County and has said he also is on the Onondaga reservation. Jacobs called Robesonian Editor Bob Horne at home Tuesday night and said he wanted to "set the records straight" about Eddie Hatcher and himself.

BOB HORNE

Editor

Timothy Jacobs says he allowed himself to be used by Eddie Hatcher on Feb. 1, when the two men held up to twenty people hostage for 10 hours in the Robesonian newspaper, and that he has regretted it ever since.

"He (Eddie Hatcher) has just destroyed me. I told mother tonight, I don't know what to do. I have nightmares about Eddie Hatcher; he's just destroyed me," Jacobs said.

"Eddie came up with the idea (of taking hostages) on Saturday (Jan. 30) and on Sunday he said, 'I'm going to take over that building with or without you,'" Jacobs said.

"I said, 'You're going to get yourself killed or get somebody else killed.' I really was afraid he would get hurt or hurt somebody else and I went in there with him to keep him from hurting somebody."

"He said, 'I ain't going to threaten those people' and we got in there and everything turned." Jacobs, who said there were times on Feb. 1 that he thought Hatcher might hurt someone, said

Hatcher "changed over night; he just slipped and he's not been the same since."

"We started having problems when we were jailed the night of Feb. 1. I said, 'you disrespected those people and talked to them like they were nothing. You said you weren't going to do anything like that.' They (law enforcement officers) had to separate us."

Jacobs says Hatcher has turned into "a media hound" since Feb. 1 and that people "have been wondering where Timmy Jacobs is, what's he got to say and saying he must agree" and I wasn't around to speak. For a long time I've been thinking about this; it's very frustrating to me. I'm not a media hound but I had to get it off my chest.

"I just want you, the people at The Robesonian and the people of Robeson County to know I was just trying to help him not hurt himself or anybody else on Feb. 1.

"I can understand how Mike Mangiameli (former Robesonian reporter who has openly expressed outrage at the takeover and unproven allegations of official corruption in Robeson County) feels about Eddie Hatcher. I feel the same way."

Jacobs says he was attending school at Central Piedmont Community College in Charlotte and working with young people to educate them on drug and alcohol abuse when the state filed 14 counts of second-degree kidnapping against him and he fled to the Onondaga Indian Nation in New York.

"I was trying to do something positive with my life and he's (Hatcher) done nothing except make trouble. He just destroyed me; destroyed my hopes of working with young people on drugs and alcohol, although that's what I still want to do.

"I felt like Eddie was on a road to destruction and that's what it's coming down to. And he's taking me with him. He's doing a lot of negative things that are reflecting on me. He and I don't get along, period."

Jacobs said his attorneys didn't know he was making the call.

Jacobs says he hasn't seen Hatcher in "a long time," and that Hatcher is not at Onondaga. However, last Saturday Jacobs told the Syracuse N.Y. Post-Standard that Hatcher had joined him at Onondaga. Then on Monday, he told the newspaper he wasn't sure he was talking with Hatcher. Also on Saturday, Hatcher called

The Associated Press in Raleigh and said he was with Jacobs at Onondaga. During that call, someone claiming to be Jacobs also spoke with Associated Press reporters, who say they recognized both men's voices and asked them questions to verify their identities.

When asked about the phone call to the Associated Press, Jacobs said, "That wasn't even me. That was some of Eddie's mess; I don't know who they were talking to."

Jacobs, who is fighting extradition to North Carolina for trial on the kidnapping charges, said one of the things Hatcher has done that Jacobs disagrees with was "jumping bond on the Council of Churches." The National Council of Churches posted $25,000 for Hatcher's release.

"Maybe he had reasons. I don't know," Jacobs said. "I'll continue to fight extradition but if I have to go, I'll go; I ain't going to cause anybody to lose their money."

"He's unpredictable," Jacobs said of Hatcher. "You don't know what he's going to do from one minute to the next. I helped him out and he left me holding the bag."

Jacobs says he's been haunted by the events of Feb. 1.

"Of all the people involved in Feb. 1, I probably feel the worst of all," he said. "That's the truth; it's been a living hell.

"I just wanted people to know I don't agree with his (Hatcher's) conduct on Feb. 1 and I definitely don't agree with it now."

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PORTION OF AFFIDAVIT OF ELEANOR JACOBS DATED AUGUST 2, 1989

[caption omitted]

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10. In late November, my husband's father Welbert Jacobs told my husband and me that Lee Edward Sampson had asked him to come down to his (Sampson's) office at the courthouse in Lumberton. Welbert said he went to the courthouse to see Sampson and that Sampson warned him that they were going to indict Eddie and Timothy. They wanted Timothy to testify against Eddie.

11. On December 22, 1988, SBI Agent James Bowman came to my house with an agent named Brown and talked to my husband Mancil and me for about 45 minutes. Bowman talked about seeing the article in The Robesonian about Timothy's conversation with Bob Horne. Bowman said he wanted to tell us how he felt about Timothy, that he felt Eddie had used Timothy. He said he wanted to get acquainted with Timothy's family because he was concerned about Timothy. He asked us to tell Timothy to turn himself in. He gave us a card with his phone number and asked us to tell Timothy to call him.

Agent Bowman said he (Agent Bowman) lived by the Golden Rule and he had children so he knew how we felt about Timothy. He said they really wanted Eddie, not Timothy. He wanted Timothy to testify against Eddie. He said they really wanted Eddie, not Timothy, but they had to go through Timothy to get Eddie. Bowman blasted Eddie and said he was a bad person. He said Eddie was a "troublemaker" because of what he was saying about Robeson County. He said Robeson County was different than Eddie said, that drugs weren't a big problem, and that there weren't the kind of problems that Eddie said there were. I know that wasn't true.

Agent Bowman also blasted the Christic Institute, saying they were no good and were just using Timothy to make a name for themselves. He said Timothy should fire Christic and and get local lawyers.

He said if Timothy turned himself in he'd help him get nonsecured bail and be in a jail outside Robeson County, but that he really wouldn't have to go to jail at all.

Agent Bowman said "everybody in Lumberton" had sympathy for Timothy and felt he was being used by Eddie. I understood that he was talking about his supervisors, the people in the courthouse in Lumberton, like District Attorney Britt and Assistant District Attorney Richard Towsend.

Agent Bowman also told us that Connee Brayboy and Dupree Clark had been to Lumberton to see Richard Townsend about the charges against Timothy.

12. Agent Bowman came back the following Wednesday, December 28, 1988, but I wasn't home. He came back the next day, December 29, but it was early and I wasn't dressed so my son sent him away. Later that day he called by phone. Lewis Pitts and Gayle Korotkin of Christic Institute South were there when he called. While I was speaking with Agent Bowman, they set up equipment to tape the conversation. As soon as the equipment was ready we taped the rest of the phone conversation. A copy of the transcript of that conversation is attached as Exhibit __.

13. I didn't tell Timothy about Bowman coming and what he said, but either my husband or Mr. Welburt Jacobs did tell him, and Timothy called me and asked me about it. The promises confused him very much. He didn't know what to do or who to believe. Once he told me he felt like he was going crazy. He felt like someone in Bowman's position would not lie, but I told him he couldn't just believe what Bowman said.

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[signature and notary block omitted]

AFFIDAVIT OF CONNEE BRAYBOY
DATED JUNE 12, 1989

[caption omitted]

The undersigned, being first duly sworn, deposes and says: My name is Connee Brayboy. I am a citizen and resident of Robeson County, North Carolina and serve as Editor of the Carolina Indian Voice. As such, I consider myself a leader of the Indian Community in Robeson County.

On or about 23 January 1989 I visited District Attorney Richard Townsend in his office at the Robeson County Courthouse in an effort to speak to Mr. Townsend concerning the pending prosecution of Tmmothy Jacobs. Chief Ray Littleturtle accompanied me. I had never previously spoken with or met Mr. Townsend.

After introductions, I informed Mr. Townsend that I had recently spoken with Timothy Jacobs. In that conversation, Jacobs expressed dissatisfaction with his representation by Mr. Pitts and the Christic Institute. I informed Mr. Townsend that Jacobs stated to me that he wished to dismiss Mr. Pitts and the Christic Institute, end his New York extradition fight, return to North Carolina, and enter a plea bargain with the office of the District Attorney concerning the Fourteen (14) second degree kidnapping charges. Chief Littleturtle stated that he felt the Christic Institute was using Timothy Jacobs and would ultimately injure Jacobs' best interests.

Mr. Townsend informed me that he could not interfere with Timothy Jacobs and his choice of legal counsel. Mr. Townsend also stated that Timothy Jacobs could have as his attorney whomever Timothy Jacobs wanted and that Mr. Townsend would deal with whomever Timothy Jacobs chose. Mr. Townsend also informed us that, should Jacobs return to Robeson County, Mr. Townsend would make every effort to see Mr. Jacobs treated fairly, including a request to the Court for a reasonable bond.

Chief Littleturtle told Mr. Townsend that Timothy Jacobs probably could not afford to hire a lawyer and that Jacobs needed to obtain court appointed counsel. Mr. Townsend informed us that we should speak with Angus Thompson, the newly appointed public defender, concerning appointed representation for Timothy Jacobs. Mr. Townsend telephoned Mr. Thompson to assist us in

obtaining an appointment with the Public Defender. We waited at the District Attorney's Office until Mr. Thompson arrived and escorted Chief Littleturtle and me to the Public Defender's Office.

Following this meeting, and on or about Thursday, 26 January 1989, I spoke with Mr. Lewis Pitts concerning Timothy Jacobs' case. During this conversation, Mr. Pitts asked at least three (3) times if Richard Townsend advised Timothy Jacobs to obtain a different attorney to represent him. I repeatedly informed Mr. Pitts that Richard Townsend stated that he could not involve himself in Mr. Jacobs' choice of legal counsel. I also informed Mr. Pitts that Richard Townsend said Timothy Jacobs could have as his attorney whomever Timothy Jacobs wanted to represent him and that the District Attorney would deal with whomever Timothy Jacobs chose.

[signature and notary block omitted]

TRANSCRIPT

WRAL, Channel 5, Raleigh, North Carolina
Tuesday, January 31, 1989, 6:00 p.m. Report
WRAL, TV, Raleigh, Durham, Fayetteville
Intro to Usual News Program at 6:00, music included.

CHARLIE GADDY: Eddie Hatcher and Timothy Jacobs has/have asked a federal judge to block their extradition to Robeson County to stand trial for kidnapping. The two filed a forty-four page law suit in federal court against Governor Jim Martin, Robeson County Sheriff Hubert Stone, and Superior Court Judge Joe Freeman Britt. The suit filed in Raleigh today, charges the government and law enforcement agents with violating the civil rights of Indians in Robeson County, and today Timothy Jacobs' attorney says he will use the suit to disclose wrongdoing in Robeson County.

LEWIS PITTS: We now have the subpoena power. We now possess the power to execute subpoenas, to subpoena individuals and their documents. We possess the power to present in court the real workings of this power structure.

CHARLIE GADDY: The suit alleges the law enforcement agencies in Robeson County conspired to harass and intimidate blacks and Indians. Hatcher and Jacobs are asking for damages in excess of $10,000 and they're asking for State kidnapping charges against the two of them to be dropped.

This completes the tape prepared by Video Taping Services of Charlotte, North Carolina (704) 332-2158. Thank you.

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LETTER TO NAKELL AND PITTS FROM JUDGE BRANNON DATED JANUARY 27, 1989

[date and inside address omitted]

Dear Sirs:

I am told that you gentlemen at some previous time have had occasion to represent the individuals referred to in this Court Order. It is my further understanding that neither of you gentlemen currently represent either of these individuals as attorneys of record in any case now pending in the State Courts of North Carolina. If this understanding is correct, then please write me and let me know.

My purpose in sending you gentlemen a copy of this Court Order referring to a client you formerly represented is to request you, as officers of the State Courts of North Carolina, to please forward your former clients copies of this Order to whatever may be his current address to the end that he will receive personal notification of the efforts being made in the Robeson County Superior Court to give to him his Sixth Amendment Right to Conflict Free Counsel. Further I would, of course, appreciate it if you would write me explaining what you do to carry out my request in this regard.

Enclosed also, as a matter of courtesy, is a copy of this Order for your own records.

[signature omitted]

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LETTER TO JUDGE BRANNON FROM LEWIS PITTS DATED JANUARY 30, 1989

[date and inside address omitted]

Dear Judge Brannon,

I received your letter dated January 27, 1989 and the enclosed order.

As you requested, I have mailed a copy of the order to my client, Timothy Jacobs. Further, today by telephone I fully discussed with Mr. Jacobs the matters raised in the order and your willingness to appoint a lawyer for him.

We are representing Mr. Jacobs before the court in Madison County, New York. We have a hearing on our petition for habeas corpus (resisting extradition) on February 28, 1989 and a hearing on February 17, 1989 on our motion pursuant to New York statutes for an advisory jury at the habeas hearing.

Thank you for the order.

[signature omitted]

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LETTER TO JUDGE BRANNON FROM BARRY NAKELL DATED JANUARY 31, 1989

[date and inside address omitted]

Dear Judge Brannon:

I have received your letter of January 27, 1989.

I have forwarded the enclosed January 26, 1989 Order to Mr. Hatcher together with a copy of your letter.

I appreciate your conscientious concern for Mr. Hatcher's right to counsel. I assumed that Ms. Bowman would continue to represent Mr. Hatcher in her capacity as an Assistant Public Defender. I also understood that a case assigned to the Public Defender's office would be assigned to that office generally and not to any particular attorney in that office. I assumed that the Public Defender would make the assignments within his office. Accordingly, I am not sure that this Order was necessary.

I am enclosing for your information a copy of a Complaint that was filed in Federal Court today because I think it will explain to you some of the background underlying this case, including some developments that I am advised might have been brought to your attention.

With all good wishes.

[signature omitted]

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AFFIDAVIT OF JOAN HERRE BYERS
DATED AUGUST 21, 1989

[caption omitted]

The undersigned, being first duly sworn, deposes and says:

My name is Joan Herre Byers. I am a Special Deputy Attorney General with the North Carolina Department of Justice. Together with James J. Coman and David Roy Blackwell, I was assigned to handle the Robeson County, et al. v. Joe Freeman Britt, et al. lawsuit filed by Messrs. Pitts, Nakell, Kunstler, Taylor, Ross, and others.

In the initial stages of the lawsuit I had a telephone conversation with Mr. Nakell in which I told him that James J. Coman, David Roy Blackwell, and I represented all the State Defendants. I then listed the State Defendants. Mr. Nakell expressed surprise when I listed Joe Freeman Britt and Richard Townsend as clients. He stated he thought they were county employees. I pointed out they were not county employees, but were State Constitutional officers, were paid by the Administrative Office of the Courts, and that when Mr. Britt was District Attorney, his District was multicounty. I pointed out Lee Sampson was also a State employee. Mr. Nakell made no further response concerning employment status of the defendants.

Though not germane to Rule 11 sanctions against these Plaintiffs, some second hand hearsay involving me included in the proffer by Plaintiffs needs clarification.

As a Special Deputy in the Criminal Division of the Attorney General's office, I am often called upon to do research for Superior Court Judges since State trial judges have no clerks and often need assistance. I frequently receive calls from Judges and specifically receive calls from Judge Anthony A. Brannon on matters of law. I received such a call when Gordon Widenhouse, an Assistant Appellate Defender and I were working on settling a record. I spoke to Judge Brannon in Mr. Widenhouse's presence and told Judge Brannon of Mr. Widenhouse's presence. I cannot recall the reason Judge Brannon called; I do know he did not call me to discuss who to appoint as a lawyer for Timothy Jacobs. During the conversation I asked Judge Brannon if Mr. Jacobs had counsel yet in his North Carolina cases. Judge Brannon said to his knowledge

Jacobs did not, and that he, Brannon, would probably have to appoint someone and that he would probably appoint someone from the Cumberland Bar since he had made or was making arrangements to have Jacobs housed in the Cumberland County Jail. As I recall, I reminded him of Gordon Widenhouse's presence and asked the Judge if I should ask Gordon for his opinion of good trial lawyers from that county. It is my recollection that Judge Brannon asked me to do so. Gordon, after being asked and being told why I was asking, named several lawyers including James Parrish. I repeated the names to Judge Brannon. James Parrish was the only person I knew from the list given me by Gordon and so the only name I now recall. I do remember he listed several other names, all of which I repeated to Judge Brannon. I concluded my business with Judge Brannon and he hung up. Mr. Widenhouse and I then concluded our work on the record on appeal.

I never told Mr. Nakell whether I thought the lawsuit was or was not frivolous. I took the lawsuit seriously because of my knowledge of the attorneys representing the plaintiffs, because of the vicious nature of the allegations, and because of the fact that the Governor, the Attorney General, and the Head of the State Bureau of Investigation, a Superior Court Judge, a District Attorney, an SBI Agent and a former SBI Agent were being sued. The seriousness with which I approached the litigation had nothing to do with a belief that the lawsuit was meritorious as to my clients. I never believed it meritorious; only vexacious.

Mr. Nakell in his affidavit purports to characterize my reactions to various conversations and purports to quote me from the telephone call made by me to him on April 20, 1989. Due to past experience of this office with Mr. Nakell and out of concern for accuracy should any subsequent issue arise as to the nature and extent of my conversation with him, I taped my April 20, 1989 telephone call to Nakell in its entirety. A transcript is attached. (See Exhibit A). As can be seen from the transcription, Mr. Nakell's recollection of the conversation is flawed and the purported quotes he attributes to me cannot even be fairly called a paraphrase of anything I said. I never suggested to Mr. Nakell or implied to Mr. Nakell during any conversation that the State Defendants would forego Rule 11 Sanctions.

AFFIDAVIT OF JOAN HERRE BYERS, CONT'D.

In the course of my representation of defendants Britt, Thornburg, et. al, I obtained a release from Mr. Britt in order to obtain the documents from the Bar Complaint filed by Mr. Nakell against Mr. Britt prior to this law suit. No probable cause was found by the Bar. (See Exhibit B).

In the course of the litigation, I had only a few conversations with Mr. Nakell. In these conversations I consistently asserted that the State Defendant's would adhere strictly to Rules of Procedure and would not engage in informal agreements with Plaintiffs (Exhibit C). I did not return the last telephone call to Mr. Nakell because I wished to have no further communication with him other than by written motion in Court.

Further the affiant sayeth not.

This, the 21st day of August, 1989

[signature and notary block omitted]

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EXHIBIT A TO AFFIDAVIT OF JOAN HERRE BYERS DATED AUGUST 21, 1989

Transcript of Telephone Conversation, April 20, 1989, between Joan Byers and Barry Nakell.

Nakell: Hello.

Byers: Hello, may I please speak to Mr. Nakell?

Nakell: Speaking

Byers: Hey, this is Joan Byers.

Nakell: Hi Joan.

Byers: Hi, I talked with Andy, tried to talk with Jim, but didn't get up with him. Now, you were talking about a dismissal with prejudice, weren't you?

Nakell: Yes

Byers: Okay, so you are going to take a dismissal with prejudice at this time.

Nakell: Yes.

Byers: Okay, under those circumstances, we do not oppose a dismissal with circumstances, with prejudice.

Nakell: With prejudice, alright I tried to call Steve Lawrence yesterday, and was told he was in trial, so I haven't reached him.

Byers: Okay, I spoke with him last night.

Nakell: Oh, you did?

Byers: Uh huh

Nakell: OH, Okay. I had left word for him.

Byers: He's still in his trial.

Nakell: Uh huh,

Byers: I called him at home.

Nakell: Called him at home, okay. Well, do you have any reason to think that he has different

Byers: Oh, I can't speak for him.

Nakell: Okay, well, should we, would you like us just to submit a motion for leave to dismiss and represent that you do not oppose that, or would you like to do it under 41-A and agree to the dismissal?

TRANSCRIPT BETWEEN JOAN BYERS AND BARRY NAKELL, CONT'D.

Byers: You can say that we do not oppose, but again, I am concerned about your authority to dismiss on behalf of all plaintiffs.

Nakell: Yes, well we'll, I guess that I now represent all plaintiffs.

Byers: Uh huh, okay and this is unconditional with prejudice.

Nakell: Right.

Byers: Okay.

Nakell: Okay?

Byers: Okay.

Nakell: Alright, I will then, I'll still try to talk to Steve then.

Byers: Um hum

Nakell: And if, actually we don't even need Steve's consent I think, because he hasn't filed a motion for summary judgement. So even under 41-A, I think we can take a dismissal under 41-A as to his clients. But I think I'll still try to catch up with him and see if we can just file the motion and make the same representation. And then we just won't say anything else, we'll just, we'll just say that.

Byers: Okay, when are you going to file this?

Nakell: I can, I would like to file it as soon as possible and I'll guess I'll just wait until, until I've had a chance to talk to Steve.

Byers: Okay, all righty.

Nakell: Uh, Uh.

Byers: Okay, I mean can you give me a date?

Nakell: If I can talk to him today, I'll file it today.

Byers: Okay,

Nakell: I would certainly hope to file it by tomorrow.

Byers: Or at least before you have to file an answer to us.

Nakell: Well, we have to file a response, we do have a deadline to file a response to them by tomorrow.

Byers: Yeah

Nakell: Because theirs was filed a couple of days earlier.

Byers: Well, that's true.

TRANSCRIPT BETWEEN JOAN BYERS AND BARRY NAKELL, CONT'D.

Nakell: So, I would like to have it on file, but I guess that's not even, not really critical, but I would like to get it done.

Byers: Of course.

Nakell: Okay, thank you very much for responding so promptly and I was just thinking, if, maybe if I don't hear from Steve today, I'll try to call him at home also.

Byers: That would probably be the best way to get up with him, because he really is

Nakell: Is his number listed?

Byers: Yes it is.

Nakell: Okay, I'll do that then and then I'll try to get it done, taken care of by tomorrow if he agrees that should be no problem, and if he doesn't, I think I would probably just file the motion and say that under 41-A, we can do it without leave of court as to his clients and that we have, that you do not oppose it.

Byers: We do not oppose it.

Nakell: You do not oppose it. Okay.

Byers: Okay.

Nakell: Thank you very much Joan.

Byers: Uh huh

Nakell: Bye.

Byers: Bye, bye.

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AFFIDAVIT OF MALCOLM RAY HUNTER, JR.
DATED AUGUST 1, 1989

AFFIDAVIT

I, Malcolm Ray Hunter, Jr., being first duly sworn, depose and say:

1. I am the Appellate Defender for the State of North Carolina.

2. I am counsel for the petitioner in McKoy v. North Carolina, 323 N.C. 1, 372 S.E.2d 12 (1988), cert. granted, 109 S.Ct. 1117 (1989). After the United States Supreme Court granted certiorari in that case on 21 February 1989, I asked Mr. Gordon Widenhouse, an attorney in my office, to meet with Ms. Joan Byers, of the Attorney General's Office, to settle the Joint Appendix in the case.

3. Mr. Widenhouse met with Ms. Byers on two occasions during March, 1989. After one of those meetings, Mr. Widenhouse mentioned that while he was in Ms. Byers' office, Superior Court Judge Anthony Brannon telephoned her. Mr. Widenhouse said that he believed Judge Brannon and Ms. Byers were discussing who would be appropriate counsel for Judge Brannon to appoint to represent Mr. Timothy Jacobs. Mr. Widenhouse told me that, during her conversation with Judge Brannon, Ms. Byers turned to him and asked him who he thought would be a good criminal defense attorney from that area. Mr. Widenhouse said that he suggested two or three names, including that of Mr. James Parish.

4. On April 22, 1989, I attended the North Carolina Civil Liberties Union dinner to honor Barry Nakell. I sat near attorneys from the Christic Institute South, and during the course of the dinner told them about this incident.

[signature and notary block omitted]

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AFFIDAVIT OF NEAL P. ROSE DATED JUNE 1, 1989

State of New York
County of Madison

AFFIDAVIT

NEAL P. ROSE, being duly sworn deposes and states that:

1. Deponent is the duly elected District Attorney of the County of Madison, State of New York.

2. Deponent makes this affidavit in support of an application by the Attorney General of the State of North Carolina for Federal Rule 11 sanctions against the Christic Institute-South, and E. Lewis Pitts.

3. During December 1988 and the months of January, February, and March 1989, deponent prosecuted extradition proceedings brought in the State of New York against Timothy B. Jacobs, a North Carolina resident.

4. During the course of these extradition proceedings, the defendant, Timothy B. Jacobs, was jointly represented by E. Lewis Pitts, appearing for the Christic Institute-South, and by Attorney Alan Rosenthal of Syracuse, New York.

5. On motion of Attorney Alan Rosenthal, E. Lewis Pitts was admitted pro hoc vice to practice in New York State by Madison County Judge William F. O'Brien III.

6. Based upon discussions that deponent had with representatives of the office of the Attorney General in North Carolina and with E. Lewis Pitts, deponent became aware that Timothy B. Jacobs among others had commenced a civil lawsuit against numerous public officials in the State of North Carolina. On two or three occasions deponent engaged in conversation with E. Lewis Pitts during which time Mr. Pitts stated that the civil lawsuit which had been commenced in the Federal Court in the State of North Carolina could and would be summarily dropped if a satisfactory plea bargain of the charges pending in Robeson County North Carolina could be obtained.

7. Deponent recalls very clearly that in a chambers conference with the presiding Judge during the extradition proceedings and in the presence of Attorney Rosenthal, that Attorney Pitts suggested that his client might very well return to North Carolina and waive extradition if an acceptable plea bargain could be arrived at and as

part of that plea bargain he would discontinue the civil lawsuit which had been commenced by Timothy B. Jacobs and others in Federal Court in North Carolina.

8. Deponent recalls at least one occasion during the course of these extradition proceedings in New York State when E. Lewis Pitts stated in words to the effect that the civil suit commenced in Federal Court North Carolina had been commenced as leverage to bring about a favorable plea bargain for Timothy B. Jacobs, and the clear implication of Mr. Pitts' remarks was that there was no factual basis for the civil lawsuit which had been commenced.

10. As the court can see upon reading Judge O'Brien's decision on the extradition of Timothy B. Jacobs, it was determined after an extended fact-finding hearing that there was indeed no factual basis for the claims made in defense of the extradition. Deponent believes these are the same sort of allegations leveled in the Federal Court civil suit now pending.

[signature and notary block omitted]

AFFIDAVIT OF ALAN ROSENTHAL DATED JUNE 28, 1989

[caption omitted]

ALAN ROSENTHAL, being duly sworn, deposes and states that:

1. I am an attorney at law duly admitted to practice law in the Courts of the State of New York, being admitted to practice in 1975.

2. I am a partner in the law firm of Heath, Rosenthal & Weissman maintaining offices at 472 South Salina Street, Syracuse, New York.

3. I am aware of a complaint that was filed in the Eastern District of North Carolina and assigned docket number 89-06-CIV-3-H wherein Timothy Jacobs is one of the named plaintiffs.

4. I have been advised that this action has been discontinued and that the Attorney General of the State of North Carolina has made application pursuant to Rule 11 of the Federal Rules of Civil Procedure for sanctions against the Christic Institute-South and Lewis Pitts, Esq.

5. I have been provided with a copy of an affidavit executed by Neal P. Rose, District Attorney of Madison County, State of New York. I have read Mr. Rose's affidavit and take issue with his subjective determination that Mr. Pitts implied that there was no factual basis for the civil lawsuit referred to above.

6. I was local counsel for Timothy Jacobs during his extradition proceeding in New York. In that case I served as local counsel to Lewis Pitts, Esq. During the numerous conversations I had with Mr. Pitts about the impending civil lawsuit, referred to above, never once was it every directly stated, or even implied, that there was no factual basis for the civil law suit.

7. During the course of discussions with Judge William F. O'Brien, the Judge presiding during the extradition proceeding, and Mr. Rose, several times it was suggested to Mr. Pitts that he attempt to reach a disposition on the criminal charges pending in North Carolina. During these discussions the subject turned to the possibility of obtaining local counsel in Robeson County for Mr. Jacobs so that the Robeson County officials would not be affected by their apparent antagonism towards Mr. Pitts. Mr. Pitts

repeatedly explained that if it would help he would withdraw from the case. He attempted to emphasize that the Christic Institute did not have a vested interest in the case and would do whatever was best for their client, Mr. Jacobs, including turning the case over to local counsel. Mr. Pitts further indicated that if it might make the Robeson County District Attorney more willing to discuss negotiating a plea agreement the lawsuit could be discontinued since it was suggested that it might be a sore point. At no time did Mr. Pitts say anything to imply that the lawsuit commenced in Federal Court in North Carolina was merely commenced for leverage to bring about a favorable plea bargain for Mr. Jacobs, nor did he imply that there was no factual basis for the civil lawsuit.

8. I was present during all of the Chambers conferences conducted between District Attorney Rose, Judge O'Brien and Mr. Pitts.

9. During several of these conferences the District Attorney took such an antagonistic posture towards Mr. Pitts so as to refuse to speak to him. I believe that Mr. Rose's personal antagonism towards Mr. Pitts has affected his ability to accurately represent any implications of Mr. Pitts' remarks.

[signature and notary block omitted]

PORTION OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER FILED MARCH 22, 1989

***

On the other hand, Plaintiffs' Complaint alleges serious continuing constitutional violations independent of as well as including the state criminal prosecution. Plaintiffs are entitled to have their request for injunctive relief against those violations considered by this Court without unnecessary delay. Defendants' reliance on their criminal prosecution against two of the Plaintiffs is not a ground for delaying discovery and thus delaying appropriate injunctive relief on behalf of all of the Plaintiffs. Cf., Dellinger v. Mitchell, 442 F.2d 782, 785-787 (D.C. Cir. 1971). The Complaint alleges that Defendant James Bowman has played a major role in all of the alleged constitutional violations. For that reason, Plaintiffs' judgment to begin discovery with his deposition was and is a reasonable one. Indeed, Plaintiffs anticipate that as a result of this deposition they will be in a position to apply to the Court for temporary injunctive relief and make the showing required by Rule 65 (b) of the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action.

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MOTION FOR LEAVE TO FILE VOLUNTARY DISMISSAL FILED APRIL 21, 1989

[caption omitted]

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, all Plaintiffs move for leave to file a voluntary dismissal with prejudice of this action against all Defendants.

Counsel for all Defendants have authorized Plaintiffs to represent to the Court that they do not oppose this motion and do not object to the Court granting it.

[signatures and certificate of service omitted]

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
No. 89-06-CIV-3-H

ROBESON DEFENSE COMMITTEE, et al.,
Plaintiffs,

v.

JOE FREEMAN BRITT, et al.,
Defendants.

ORDER

It is hereby ordered that Plaintiffs' motion for leave to file a voluntary dismissal with prejudice of this action against all Defendants, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, without objection by Defendants, is hereby granted.

SO ORDERED, this 1st day of May, 1989.

Malcolm J. Howard

[signature omitted]

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AFFIDAVIT OF WILLIAM M. KUNSTLER DATED JULY 29, 1989

[caption omitted]

William M. Kunstler, an attorney duly licensed to practice as such in the State of New York and the District of Columbia, hereby affirms, under the pains and penalties of perjury, as follows:

1. I am one of the attorneys for plaintiffs herein against whom a Rule 11 motion has been made by defendants.

2. In view of the fact that I was involved as defense counsel in a number of suppression and other motions with reference to criminal prosecutions in the State of New York, I did not actively participate in the instant litigation, relying on Prof. Barry Nakell, who was on the scene, to prepare and file it.

Dated: New York, N.Y.

July 29, 1989

[signature and notary block omitted]

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N. C. GENERAL STATUTE § 7A-60

District attorneys and prosecutorial districts.

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) (Effective until July 1, 1990) The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

Prosecutorial District	Counties	No. of Full-Time Asst. District Attorneys
	***	
16B	Robeson	7
	***	

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N. C. GENERAL STATUTES § 7A-61

Duties of district attorney.

The district attorney shall prepare the trial dockets, prosecute in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district, advise the officers of justice in his district, and perform such duties related to appeals to the Appellate Division from his district as the Attorney General may require. Effective January 1, 1971, the district attorney shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. Each district attorney shall devote his full time to the duties of his office and shall not engage in the private practice of law. (1967, c. 1049, s. 1; 1969, c. 1190, s. 5; 1971, c. 377, s. 5.1; 1973, c. 47, s. 2; 1985, c. 764, s. 7; 1987 (Reg. Sess., 1988), c. 1037, s. 12.)

FILED
DEC 20 1990

No. 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE WILLIAM M. KUNSTLER,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BENJAMIN R. CIVILETTI, *ET AL.*, IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-802

IN RE WILLIAM M. KUNSTLER,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BENJAMIN R. CIVILETTI, *ET AL.*, IN SUPPORT OF GRANT OF THE PETITION FOR CERTIORARI

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Benjamin R. Civiletti, Philip H. Corboy, John J. Curtin, Jr., Sanford Levinson, Ronald L. Olson, Michael E. Tigar, and William O. Whitehurst, Jr. move this Court for leave to file the accompanying Brief Amicus Curiae in Support of Grant of Petition for Certiorari.

Grounds For This Motion

Counsel for Respondents have stated to Amici's Counsel of Record, Michael E. Tigar, that they do not oppose amici filing this brief, but that they cannot "consent" to such filing. Accordingly, this motion is necessary.

Amici have wide experience in litigation, public service, bar association activities and law teaching. They wish to draw the Court's attention to reasons for granting certiorari that are additional to those in the petition itself. The "interest of the amici" discussion below shows that amici have a vital professional interest in, and broad professional experience with, the issues presented by the petition.

Interest of the Amici

Amici are, in alphabetical order:

Benjamin R. Civiletti was Attorney General of the United States, and Chair of the Section of Litigation of the American Bar Association [ABA], and is a Fellow of the American College of Trial Lawyers, and an attorney in private law practice.

Philip H. Corboy was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

John J. Curtin, Jr., is President of the American Bar Association, was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

Sanford Levinson is McCormick Professor of Law at the University of Texas School of Law, and teaches and writes in the field of professional responsibility and the legal profession.

Ronald L. Olson was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

Michael E. Tigar holds the Joseph D. Jamail Centennial Chair in Law at the University of Texas School of Law and was Chair of the Section of Litigation of the ABA.

William O. Whitehurst, Jr. was President of the State Bar of Texas and is an attorney in private practice.

Amici appear in their individual capacities, and not on behalf of any firm or organization. Their qualifications and backgrounds are only partially summarized above. They hold differing views on the attorney conduct that is the basis of this matter, but all of them agree that the issues are important and worthy of this Court's review on certiorari. They believe that the exponential growth in the number and size of Rule 11 and related sanctions poses a distinct challenge to the legal profession.

CONCLUSION

For the foregoing reasons, amici respectfully request that they be permitted to appear in this matter and that the accompanying brief be filed.

Respectfully submitted,

/s/ Michael E. Tigar

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IN THE

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OCTOBER TERM, 1990

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IN RE WILLIAM M. KUNSTLER,

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Respondents.

BRIEF AMICUS CURIAE OF BENJAMIN R. CIVILETTI, *ET AL.*, IN SUPPORT OF GRANT OF THE PETITION FOR CERTIORARI

Although this brief is filed in No. 90-802, amici understand that the other attorneys sanctioned in the case below, 914 F.2d 507 (4th Cir. 1990), as well as those involved in *Blue v. Department of the Army*, 907 F.2d 525 (4th Cir. 1990), decided the same day by the same court, will seek review here. Amici believe that granting review in all of these cases will provide a richly-detailed record suitable for mapping some procedural limits on Rule 11.

REASONS FOR GRANTING THE WRIT

This Case Presents Serious and Recurring Rule 11 Procedural Issues

A. Background and Context of Rule 11

Rule 11, originally based on old federal Equity Rule 24, was amended in 1983 to broaden the signing attorney's obligation and the district judge's power.[1] It supplements the power of courts under 28 U.S.C. § 1927 to sanction those who vexatiously multiply litigation, and the limited powers available under 18 U.S.C. § 401, the general contempt statute. See also F.R.Crim.P. 42 (contempt procedure).

The 1983 Advisory Committee's prediction that "a greater range of circumstances will trigger . . . violation" than under the former rule has proven to be (probably unintentional) understatement. "The large number of reported opinions . . . can only be a fraction of the large number of instances in which sanctions have been imposed." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986). See generally C. Shaffer & P. Sandler, eds., Sanctions: Rule 11 and Other Powers (2d ed. 1987) (published by the ABA Section of Litigation).

B. Appellate Review and the Need for Procedural Standards

This Court has held that a district judge's imposition of sanctions is reviewable for abuse of discre-

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[1] For some background, see generally Risinger, Honesty in Pleading and Its Enforcement: Some 'Striking' Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 8-14 (1976). See also Advisory Committee Notes to 1983 Amendment to Rule 11.

tion, a standard that affords the district court substantial deference. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 2457-61 (1990). Compare *Thomas v. Capital Sec. Serv., Inc.*, 835 F.2d 866, 873 (5th Cir. 1988) (en banc) abuse of discretion).

Given the potential impact of sanctions on lawyers' lives and reputations—not to mention clients' ability to obtain representation—the existence of a relatively unreviewable sanction discretion obviously poses substantial risks. In this case, the petition presents two means of curbing those risks while serving whatever proper purposes Rule 11 may possess.

These issues may, we suggest, be summarized as "timing" and "fair hearing." Because broadening the scope of review, at least in most Rule 11 cases,[2] is an unlikely event, the best means to guide district court discretion is formulation of clear procedural rules. This case presents an opportunity to advance that process.

"Fair Hearing: Summary Procedures Increase the Risks of Misapplying Rule 11

The petition discusses the wisdom of the district court hearing evidence before deciding contested issues of fact with which she is not otherwise familiar. Amici would add that this Court should consider some salutary analogies to the principles at stake here.

The contempt power, F.R.Crim.P. 42, can be exercised summarily only if the district judge "saw" or

---

[2] When first amendment issues are at stake in a Rule 11 context, it can be argued that the standards of Bose Corp v. Consumers' Union of America, 466 U.S. 485, 499 (1984), should apply.

"heard" the misconduct, and then only under stringent limitations. See generally *Harris v. United States*, 382 U.S. 162 (1965). The reach of summary contempt has been curbed, even when exercised by state court judges. See generally *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974).

Yet, as the petition notes, several courts of appeals have omitted to formulate a standard of adversary inquiry for disputed sanction findings. No doubt many sanction cases involve conduct the district judge saw or heard. This case, in sharp contrast, turns on motivations, credibility and the meaning of events that were never the subject of an evidentiary hearing of the kind normally expected in our system of justice before a court orders one party to pay the other a substantial sum of money, and makes findings that seriously damage reputations.

It is also relevant, we believe, that this case was filed against public entities and officials and involved allegations of constitutional violation. In awarding sanctions, the district judge found that the lawsuit was filed "for publicity, to embarrass state and county officials, . . . to intimidate those involved in prosecution . . . " These are serious allegations, but they raise serious questions about the procedural means by which they were found to be true.

The underlying lawsuit did not seek judicial adjustment of ordinary private rights. It invoked constitutional protection, and was thus an exercise of the right of petition. Compare *Eastern R.R. Presidents' Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The potential chill of Rule 11 is particularly great in a case such as this. Avarice may drive a lawyer to misconduct when the monetary stakes are high. These lawyers came into these cases with no prospect of financial reward. Their clients and their supporters were no doubt unpopular with local and state officials, the more so because a federal jury had acquitted Hatcher and Jacobs. The lore of litigators is flecked with stories of lawyers who have come forward in cases of this kind. Their willingness to come forward has brought significant cases to this Court in almost every decade of our national history.

Timing: Rule 11 and the Return of Professionalism

For lawyers concerned, as we are, with restoring the profession's faded image, timing and notice provisions are crucial.

As the Fifth Circuit has suggested in other language, Rule 11 should not be a means for one side to "sandbag" the other. *Thomas*, supra, 836 F.2d at 880. Permitting a lawyer to run up fees and costs, and then to move for sanctions for having been "forced" to bestir himself, would encourage the sort of ambush justice that the Federal Rules in general, and amended Rule 11 in particular, were designed to end.

The "ambush" or "sandbag" issue is related to, but broader than, the potential procedural bar raised in Question One of the petition. A Rule 41(a)(2) dismissal, based on defendants' unqualified consent, is a procedural hour at which notice of impending sanctions should logically be given. But the principle behind such a determination is broader, resting upon the indisputable need for more lawyer cooperation in resolving contested litigation issues.

In *Hartmarx*, 110 S.Ct. at 2457, this Court doubted that the framers of Rule 11 intended "lengthy delay" between the alleged misconduct and imposition of sanctions.

Deterrence of lawyer misconduct is Rule 11's laudable, "central goal of deterrence," 110 S.Ct. at 2454. But every judicial act in a civil proceeding must heed the F.R.Civ.Proc. 1 admonition that the rules are to "be construed to secure the just, speedy, and inexpensive determination of every action." That goal cannot be achieved if Rule 11 is interpreted to encourage "satellite litigation". Compare *Hartmarx*, 110 S.Ct. at 2460.

The petition suggests that a consented Rule 41(a)(2) dismissal, without reservation of a right to move under Rule 11, should preclude the allegedly aggrieved party. Such a view would surely draw a bright line for advocates and judges alike. At this stage, we simply urge that fair warning is a central concern, whether the requirement be found in the rules' text or in broader prudential considerations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition should be granted.

Respectfully submitted,

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No 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. KUNTSLER,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF CERTAIN ATTORNEYS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The six attorneys whose names appear at the conclusion of this motion have all been practicing law for at least fifteen years in the federal and state courts, not only where their offices are located, but throughout the country. They are filing this brief because they are concerned that the decision of the United States Court of Appeals for the Fourth Circuit applying Rule 11 of the Federal Rules of Civil Procedure in this case threatens the ability of attorneys to zealously represent the interests of their clients, not only in the federal courts, but also in state courts which are increasingly adopting their own Rule 11's and following federal court interpretations of it.

Counsel for the *amici* have sought the consent of counsel for the respondents, Senior Deputy Attorney General James

J. Coman, who declined to consent but stated that he did not intend to oppose the filing of the accompanying brief. Undersigned counsel has read the proposed brief *amicus curiae* that has been filed on behalf of Benjamin Civiletti *et al.* and believes that the accompanying brief makes several important additional points not made in the Civiletti brief or in the petition. Accordingly, we urge that the Court grant this motion and accept the accompanying brief in support of the petition.

Respectfully submitted,

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December 21, 1990

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BRIEF OF CERTAIN ATTORNEYS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTERESTS OF THE *AMICI*

The interests of the attorneys who are seeking leave to file this brief are set forth in the accompanying motion for leave to file.

STATEMENT OF THE CASE

Instead of answering the amended complaint filed in this case, the defendants filed what they styled a motion to dismiss, even though it was accompanied by supporting affidavits. For reasons that are not relevant to this petition, plaintiffs and their attorneys, including petitioner Kuntsler, decided to dismiss the complaint with prejudice. Counsel for the defendants stated

that it would be easier if plaintiffs moved for dismissal under Rule 41(a)(2), rather than having defendants' counsel sign a stipulation of dismissal under Rule 41(a)(1)(ii), but that plaintiffs could represent in their motion that defendants did not oppose the motion. At no time did defendants ask that any terms or conditions be included in the order of dismissal, and the court granted the motion to dismiss with prejudice in the form submitted by plaintiffs. Forty-five days later, with no prior warning or even any mention of the subject, defendants moved for sanctions in the form of attorneys' fees against plaintiffs and their attorneys under Rule 11 of the Federal Rules of Civil Procedure. They alleged that the case had been filed for an improper purpose and that no adequate factual or legal investigation had been conducted, relying on the affidavits that they had submitted in support of their prior motion to dismiss.

Plaintiffs opposed the motion through the submission of counter-affidavits and also sought discovery, since there had been none in the case, and an evidentiary hearing. The district court rejected both requests, heard oral argument, and then asked defendants to submit a statement of their attorneys' fees to the court. Two days after receiving that submission, and before plaintiffs had an opportunity to reply, the court entered its order, finding that the case had been filed for an improper purpose, awarding defendants the full amount of their fees, totalling more than $92,000, and imposing a sanction payable to the court of $10,000 against each of plaintiffs' three attorneys.

On appeal, plaintiffs raised a number of arguments, most of which the court of appeals rejected, although it did vacate the sanctions payable to the court and ordered further proceedings regarding the amount of fees payable to the defendants. At the heart of the court's affirmance are two rulings that form the basis for this petition: (1) that the district court

properly entertained defendants' Rule 11 application, even though the case had been dismissed with prejudice and without any reservation by the defendants of a right to seek sanctions or attorneys' fees; and (2) that the district court did not err in refusing to permit discovery or hold an evidentiary hearing and properly made a factual finding that the case had been filed for an improper purpose solely on the basis of sharply conflicting affidavits.

REASONS FOR GRANTING THE WRIT

The Court should grant review in this case because the rulings below so far depart from fundamental principles of fairness under the Federal Rules and elementary principles of due process that this Court's intervention is required. This petition is *not* about whether petitioner and his two co-counsel were properly sanctioned under Rule 11; indeed *amici* take no position on that question. This petition asks the Court to rule on far more basic questions: whether the district court should ever have entertained the sanctions motion because the case had been concluded with no hint that defendants would seek sanctions under Rule 11, including more than $92,000 in legal fees, and whether the district court impermissibly decided contested issues of fact solely on the basis of conflicting affidavits, without affording plaintiffs the opportunity to cross-examine the witnesses relied on by defendants.

1. The petition fully sets forth the precise legal errors made below, but they can be summed up in a single phrase that covers both questions presented: the absence of fairness and fundamental due process. Quite apart from the technical requirements of Rule 41(a), it is simply unfair to allow a party to consent to the dismissal of a lawsuit, with prejudice, and with no reservations of any kind, and then to be permitted to return to court 45 days later, and seek nearly $100,000

in legal fees from its adversary. While it was defendants here who sought fees under Rule 11, it could equally be the plaintiffs in another case who would rely on that Rule, or even 42 U.S.C. § 1988, in making a comparable request. Accordingly, when a motion to dismiss is made under Rule 41, or a settlement is entered into between the parties, everyone is entitled to know all of the terms of the deal, including whether there are any hidden requests that may surface later. Unless a dismissal with prejudice means that the case is truly over, counsel will have to think of all the possible requests that their adversary may make and specifically negate each of them. There is no reason to impose such a burden on counsel or to erect such barriers to the peaceful resolution of litigation. If a party has reservations or wishes to preserve its options to seek any form of ancillary relief, the burden should be on that party to assure that any order of dismissal is conditioned on the right to seek that relief, and failure to include such conditions should preclude the court from even entertaining that request.

It is important to note that disputes about Rule 11 do not always or even primarily involve money. In this case the district court ruled that petitioner had filed a lawsuit for an improper purpose, a charge that, in itself, is devastating to the reputation of any attorney, and one that cannot be allowed to go unopposed, even if defendants had sought only $1 in sanctions. *Amici* can attest from their own experiences that disputes about attorneys' fees always engender significant passions on both sides, a problem that increases exponentially when the reputation of an attorney is added to the matter, as is invariably true under Rule 11. The problems are only intensified where, as here, the district court awarded fees and found an improper purpose on petitioner's part, which meant that petitioner (as well as his co-counsel) had to hire counsel to represent him on appeal and now to seek review in this Court.

Moreover, while the sanctioned persons are attorneys here, the target of a Rule 11 motion will often include clients who thought that the case was over. Indeed, their presence as targets of a Rule 11 motion may well necessitate the retention of additional counsel to represent them, since their interests and defenses may differ from those of their original counsel. Of course, all of this would have been avoided had the district court done the only fair thing under these circumstances and refused to consider defendants' untimely Rule 11 motion. Because it failed to do so, and because the court of appeals failed to correct that error, this Court should grant review so that everyone will know that, if a party wants to seek sanctions under Rule 11, and the other side either seeks to settle the case or dismiss it by consent or motion under Rule 41(a), that party must tell its adversary beforehand and not wait until after the court has entered an order of dismissal.

2. Review should also be granted because of the fundamentally unfair way that the district court decided the sharply contested factual issue of the purpose for which petitioner and his co-counsel filed this case. As explained in the petition, the district court had no personal familiarity with the case prior to the filing of the Rule 11 motion, other than the ministerial act of approving the uncontested motion to dismiss under Rule 41(a)(2). The only "evidence" on the issue of improper purpose were affidavits from opposing sides, each with its very different view of the facts. There had been no discovery, and no opportunity to test the truth of either set of affidavits through cross-examination, either on deposition or in open court. Despite all of this, the district court simply proceeded to resolve the disputed factual issue on the papers alone, in this case in favor of defendants, although it would have been equally improper for him to have decided the issue in favor of plaintiffs if defendants had made comparable requests.

Whatever the proper procedure for resolving factual disputes in Rule 11 situations may be, they are a far cry from what the district court did here. This can be seen by comparing how little process was afforded here in contrast with what would have happened had defendants sought similar relief other than under Rule 11. Suppose that they had sought the same $92,000 in attorneys' fees under 42 U.S.C. § 1988 or the bad faith exception to the American rule. While this Court has made it clear that a fee dispute should not become "a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424,437 (1983), it is inconceivable that a dispute of this magnitude would be resolved by so summary a process. *See Norman v. Housing Authority*, 836 F.2d 1292, 1304 (11th Cir. 1988)(requiring oral hearing "where there is a dispute of material historical fact" in fee disputes). Or consider what would have happened if defendants had filed a state law counterclaim for abuse of process or some similar claim of tortious conduct under North Carolina law, which is, in essence, what they alleged here under Rule 11. Surely, in that case, let alone in one brought as an independent action, no one would consider resolving a dispute of this kind without discovery and in all probability a trial, or at least strict compliance with Rule 56, or its state law equivalent. Yet here, the district court simply threw aside any semblance of fairness and due process and awarded nearly $100,000 to defendants.

There is another closely analogous proceeding to what occurred here that helps crystalize the error of the district court. The only portion of the ruling below against petitioner that the court of appeals set aside was the $10,000 monetary sanction imposed against him and his two co-counsel and made payable to the district court. That portion of the district court's Rule 11 order is very similar to an order of criminal contempt, with its judgment of improper conduct against a member of the bar and its payment of money to the court, rather than

to a private party or its counsel. But Rule 42 of the Federal Rules of Criminal Procedure, as well as this Court's recognition that due process applies to criminal contempt proceedings, *Harris v. United States*, 382 U.S. 162 (1965), provides assurances that any person accused of criminal contempt has adequate notice and an opportunity to be heard, not the "trial by affidavits" approved by the court of appeals here. To be sure, a person facing criminal contempt may be sent to jail, but for members of the bar, their reputations may be more important to them than a day or two in detention. Regardless of the differences between the proceedings, the nature of the sanction that the district court imposed here is sufficiently close to criminal contempt, yet the procedures employed by it so far from those under Rule 42(b), as to suggest that the courts below have violated concepts of fundamental fairness in summarily adjudicating vital rights in a Rule 11 motion without affording petitioner a meaningful opportunity to present his defense.

There is another reason why the procedures followed by district courts in deciding Rule 11 motions are so important. Last term in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457-61 (1990), this Court held that the standard of review for the courts of appeals in Rule 11 cases was whether the decision was an abuse of discretion. As a result, every Rule 11 decision of a district court takes on special importance because it is effectively insulated from searching judicial review. Therefore, the procedural protections of discovery and an opportunity for a hearing may be the only safeguards against arbitrary imposition of penalties against those who bring unpopular cases, as this case surely was.

Indeed, the situation is even worse in some circuits where magistrates have been allowed to decide Rule 11 motions and impose sanctions, subject only to the district court's review

under the "clearly erroneous" standard. *Maisonville v. F2 America Inc.*, 901 F.2d 746 (9th Cir. 1990), *petition for certiorari pending sub nom. Dombroski v. F2 America, Inc.*, No. 90-617. But if, as the court of appeals permitted here, even the basic requirements of due process need not be observed, there is no protection for the attorney who does anything that might bring displeasure to the judge before whom he or she is appearing. This Court should grant review to assure that the procedural protections afforded under Rule 11 are not the diluted ones used here, but include a meaningful opportunity to contest the essential factual issues on which Rule 11 motions are decided when the basis for imposing sanctions is that the attorney filed a case for an improper purpose, as the district court concluded here.

* * * *

This petition was filed by a member of the bar, and this *amicus* brief is submitted on behalf of six attorneys. In many if not most cases under Rule 11, the sanctions award is directed against an attorney, although some clients pay such awards for their counsel. But regardless of who pays in the short run, in the long run it is clients who will suffer, and those who will suffer the most are the neediest in our society who turn to the courts because they have no other hope of redress. If lawyers are in constant fear of damaging both their reputations and their bank accounts because of Rule 11, and if they believe that they will not even be afforded fair procedures for having Rule 11 claims against them adjudicated —as they surely will if this decision is allowed to stand — then they will simply not take on these cases, and the clients who so desperately need their help will be left outside the courthouse doors. Cases like this, which are invariably taken on a contingent fee basis, are hard enough to win that they discourage most lawyers from taking them, without the sword of Rule 11 and the lack of due process and fundamental fairness hanging over their heads.

With the added burden imposed by the rulings below, the message will be clear when cases like this come through the door: just say no.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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December 21, 1990

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Nos. 90-802, 90-807, and 90-1094

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In re WILLIAM M. KUNSTLER,
Petitioner,
In re LEWIS PITTS,
Petitioner,
In re BARRY NAKELL,
Petitioner,

ROBESON DEFENSE COMMITTEE, *et al.*,
Plaintiffs,
v.
JOE FREEMAN BRITT, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, U.S. REPRESENTATIVES HOWARD COBLE AND J. ALEX McMILLAN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONS

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IN THE
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OCTOBER TERM, 1990

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief as *amici curiae* in support of Respondents' opposition to the petitions for certiorari filed in these three cases, Nos. 90-802, 90-807, and 90-1094. Counsel for Respondents have consented to the filing of this brief, as has Petitioner Barry Nakell. Petitioner Lewis Pitts and counsel for Petitioner William Kunstler have not consented to the filing and have reserved their rights to oppose the filing at a later time. Accordingly, this motion is necessary.

The Washington Legal Foundaton is a national public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court and other state and federal courts on numerous occasions in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts. WLF believes that amended Rule 11, Fed. R. Civ. P., can be an effective tool in combatting the ill effects of the litigation explosion; accordingly, WLF has consistently advocated for an expansive reading of Rule 11. For example, WLF appeared before this Court in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990), in support of Respondents.

Jesse Helms is a United States Senator from North Carolina. Howard Coble and J. Alex McMillan are U.S. Representatives from North Carolina. All three are concerned with the efficient operation of the court system in North Carolina and believe that it is important that

those who abuse the legal system ought to be sanctioned for their conduct.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* in this Court on a number of occasions. AEF believes that the public interest is best served by a legal system that deters abusive litigation practices by sanctioning those found to be engaging in such conduct.

Amici previously submitted an *amicus curiae* brief in this case when it was before the United States Court of Appeals for the Fourth Circuit. *Amici* believe that their experience in litigating Rule 11 matter may prove of assistance to the Court in its consideration of this Petition. *Amici* also believe that their brief provides a perspective that differs from the perspective provided by any of the parties, because *amici*'s brief is based less on the particular facts of this case and more on the broader policy considerations underlying Rule 11. *Amici* note that three groups are seeking leave to file *amicus* briefs in support of the Petitions.

For all the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Is a defendant prohibited from filing a motion for sanctions under Rule 11 of the Federal Rule of Civil Procedure following a Rule 41(a)(2) dismissal where the defendant -- prior to dismissal -- has not expressly reserved the right to seek sanctions?

2. Does the Fifth Amendment's Due Process Clause require a district court to conduct an evidentiary hearing whenever disputed factual issues arise in a Rule 11 proceeding?

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In re WILLIAM M. KUNSTLER,
Petitioner,
In re LEWIS PITTS,
Petitioner,
In re BARRY NAKELL,
Petitioner,

ROBESON DEFENSE COMMITTEE, *et al.*,
Plaintiffs,
v.
JOE FREEMAN BRITT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, U.S. REPRESENTATIVES HOWARD COBLE AND J. ALEX McMILLAN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONS

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

Petitioners are three attorneys seeking review of a decision of the United States Court of Appeals for the Fourth Circuit, which upheld a district court decision that Petitioners had violated Rule 11 of the Federal Rules of Civil Procedure by filing a complaint "for an improper purpose" and without first making "a reasonable inquiry to determine if the complaint was well grounded in fact and warranted by existing law."[1] In the interests of judicial economy, *amici* adopt by reference the statement of the case set forth by Respondents.

Amici's principal reason for submitting this brief is not to support a particular version of the facts of this case but to urge the Court not to consider giving Rule 11 the unnecessarily narrow reading pressed by Petitioners. Rule 11 is a valuable tool in the effort to curb abusive litigation; its use ought to be encouraged to the maximum extent possible, consistent with its language and intent. Petitioners are asking the Court to place procedural straight-jackets on Rule 11 such that few aggrieved parties would have either the time or the resources necessary to pursue a Rule 11 claim. *Amici* respectfully suggest that whatever benefits that might be derived from implementing Petitioners' proposed procedures are far

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[1] The Court of Appeals also vacated the $122,000 sanction imposed by the District Court and remanded the case for a redetermination of the amount of the sanction. Neither side is seeking review of the Court of Appeals's decision to vacate the Rule 11 sanction.

outweighed by the costs that society would incur in the wake of the increased litigation that would result from a weakening of Rule 11.

The procedural posture of this case is straightforward and not in dispute. Respondents filed their motion for Rule 11 sanctions six weeks after the District Court had granted Petitioners' unopposed Rule 41(a)(2) motion to dismiss the case with prejudice. The District Court permitted Petitioners to file two written briefs in opposition to the Rule 11 motion, to submit evidence in the form of affidavits, and to argue orally against the motion. However, the District Court did not conduct evidentiary hearings on disputed factual issues. Petitioners contend that the Federal Rules prohibit a defendant from filing a motion for Rule 11 sanctions following a Rule 41(a)(2) dismissal unless the defendant -- prior to dismissal -- expressly reserves the right to seek sanctions. Petitioners further contend that the imposition of sanctions in the absence of an evidentiary hearing violated their due process rights.

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, the Fourth Circuit's holdings in this case are not in conflict with the holdings from any other court of appeals. Indeed, the Fourth Circuit's holding that a Rule 41(a)(2) dismissal does not preclude a subsequent Rule 11 application for sanctions was virtually dictated by this Court's decision last year in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990). The Fourth Circuit's guidelines regarding when a district should conduct an evidentiary hearing in a Rule 11 proceeding, and its holding that the district courts are in the best position to determine whether an evidentiary hearing is required in any given case, are fully consistent with decisions from the other courts of

appeals. In the absence of a conflict between the decision below and other appellate decisions, review of the decision below by this Court is unwarranted.

Furthermore, the Fourth Circuit's holding was plainly correct. Nothing in the language of Rule 41(a)(2) suggests that a dismissal pursuant to that rule precludes a subsequent Rule 11 motion. The purposes of Rule 11 -- sanctioning litigants who needlessly burden the judicial system and deterring future misconduct -- are served by permitting Rule 11 sanctions to be sought both before and after a dismissal.

Requiring an evidentiary hearing every time a Rule 11 motion raises disputed factual issues would emasculate Rule 11 by substantially increasing the costs of seeking sanctions. An evidentiary hearing requirement would result in expensive satellite litigation over sanctions, since virtually every Rule 11 proceeding involves some factual dispute. When it drafted revised Rule 11 in 1983, the Advisory Committee stated that Rule 11 could not achieve its stated goals unless sanction proceedings were kept to a minimum. The Fourth Circuit correctly recognized that while evidentiary hearings may be mandated on occasion, the decision regarding whether to conduct such a hearing in a given Rule 11 proceeding is best left to the sound discretion of the district courts. The Fourth Circuit's decision that the district court did not abuse its discretion in declining to conduct an evidentiary hearing in this case was correct; moreover, that decision is not of sufficient importance to warrant review by this Court.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM ANY OTHER FEDERAL COURT

Petitioners take issue with two holdings of the Fourth Circuit in this case: (1) that Respondents' Rule 11 motion was timely even though it was filed after Petitioners' uncontested Rule 41(a)(2) dismissal motion was granted; and (2) that the District Court did not abuse its discretion in declining to conduct an evidentiary into disputed factual issues raised by the Rule 11 motion. As neither of those holdings conflicts with holdings from any other federal court, review of those holdings by this Court is unwarranted.

A. Rule 41(a)(2)

The Fourth Circuit held in this case that the timeliness of a motion for Rule 11 sanctions filed after a Rule 41(a)(2) dismissal "must be resolved on a case by case analysis," based on "equitable" considerations.[2] *In re Kunstler*, 914 F.2d 505, 513 (4th Cir. 1990). The court stated that a Rule 11 sanctions motion should not be

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[2] Rule 41(a)(2) provides in pertinent part:

> Except as provided in [Rule 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Rule 41(a)(1) provides for dismissal at the plaintiff's instance: (i) at any time prior to the filing of an answer or summary judgment motion by the defendant; or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Rule 41(a)(1) was unavailable to Petitioners in this case, because Respondents filed an answer and thereafter declined to sign a stipulation of dismissal.

granted under such circumstances if "a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after dismissal." *Id.* However, the court rejected Petitioners' contention that a Rule 11 motion for sanctions should *never* be granted following a Rule 41(a)(2) dismissal. The court held that, in the absence of any evidence that Petitioners had been prejudiced by the six-week delay between the Rule 41(a)(2) dismissal and the filing of Respondents' Rule 11 motion, the District Court's consideration of the motion was proper. *Id.*

No other court of appeals has addressed the precise issue decided by the Fourth Circuit in this case: whether a Rule 41(a)(2) dismissal precludes consideration of a subsequently filed motion for Rule 11 sanctions. Accordingly, the Fourth Circuit's case-by-case approach to that issue cannot be said to conflict with any other court of appeals decision. In the absence of a conflict among the courts of appeals, review of the issue by this Court is unwarranted.

Petitioner Nakell cites five court of appeals decisions that he contends conflict with the Fourth Circuit's Rule 41(a)(2) holding. One of those decisions is in full accord with the Fourth Cicuit's holding and the other four simply are not on point. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988)(*en banc*), one of the cases cited by Petitioner Nakell, echoes the Fourth Circuit's case-to-case approach in considering the timeliness of Rule 11 motions. *Thomas* involved a Rule 11 motion filed after a case had been decided on the merits. Although encouraging courts and litigators "to provide prompt notice of an alleged Rule 11 violation," the Fifth Circuit in *Thomas* -- like the Fourth Circuit in *Kunstler* -- declined to establish a fixed deadline by which Rule 11 motions must be filed. *Id.* at 879, 881.

The other four cases cited by Petitioner Nakell simply are not on point. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988), did not turn on the court's interpretation of Rule 41(a); rather, the Third Circuit in that case established a "supervisory rule" -- binding within that ciruit only -- regarding the timing of Rule 11 sanction motions. The two cited Ninth Circuit decisions, *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 554-55 (9th Cir. 1986), *cert. denied*, 484 U.S. 823 (1987); *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986), stand for the proposition that when a district court enters a Rule 41(a)(2) dismissal that includes any terms or conditions, the plaintiff has "a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions." *Id.* at 931. These two cases have nothing to do with Rule 11 and are of no relevance here. Even assuming that Rule 11 sanctions are "terms and conditions" of dismissal (a highly doubtful assumption, as discussed more fully below), Petitioners never asked the courts below to permit them to withdraw their dismissal motion, nor have they requested that this Court permit them to do so. The fifth case cited, *Barr Laboratories, Inc. v. Abbott Laboratories*, 867 F.2d 743 (2d Cir. 1989), dealt with a stipulated dismissal under Rule 41(a)(1)(ii), not (as here) a Rule 41(a)(2) dismissal. As the Fourth Circuit noted in distinguishing *Barr Laboratories*, Respondents (unlike the defendants in *Barr Laboratories*) never signed a stipulation of dismissal and never indicated to Petitioners that they would not be seeking Rule 11 sanctions. *Kunstler*, 914 F.2d at 512.

Petitioner Kunstler cites two district court decisions that allegedly conflict with the Fourth Circuit's decision. Neither case is on point. *Roe v. Operation Rescue*, No.

88-5157, 1989 WL 66452 (E.D. Pa., June 19, 1989), did not turn on Rule 41(a)(2). Rather, the district court in that case denied the Rule 11 motion in accordance with the Third Circuit's "supervisory rule" established in *Mary Ann Pensiero. Feldman v. Village of Lombard*, No. 86 C 3295, 1987 WL 9000 (N.D. Ill. 1987), held that the defendants had waived their rights to seek Rule 11 sanctions against the plaintiff by stating at a hearing on the plaintiff's Rule 41(a)(2) dismissal motion that they would not be seeking such sanctions; the district court never indicated that silence in the face of a Rule 41(a)(2) dismissal motion could result in waiver of one's right to seek Rule 11 sanctions. Other district court decisions are fully in accord with the Fourth Circuit's interpretation of Rule 41(a)(2). *See Cambridge Products, Ltd v. Penn Nutrients, Inc.*, 131 F.R.D. 464, 466 (E.D. Pa. 1990)(citing *Cooter & Gell*, 110 S.Ct. at 2457-58); *Sauls v. Penn Virginia Resources Corp.*, 121 F.R.D. 657, 679 (W.D. Va. 1988).

Moreover, all of the decisions that Petitioners contend are in conflict with the Fourth Circuit's decision were decided prior to this Court's 1990 decision in *Cooter & Gell*. While *Cooter & Gell* dealt with the interaction between Rule 11 and Rule 41(a)(1)(i) (and not, as here, with Rule 41(a)(2)), several of *Cooter & Gell*'s pronouncements are directly relevant to the issue raised by Petitioners. Were the courts cited by Petitioners given the opportunity to reconsider their decisions in light of *Cooter & Gell*, it is highly likely that any conflict between those decisions and the Fourth Circuit's *Kunstler* decision would disappear entirely. Accordingly, further review of the Fourth Circuit's decision is unwarranted.

Furthermore, *Cooter & Gell* can be read as disapproving the Second Circuit's *Barr Laboratories* decision, upon which Petitioners so strongly rely. *Barr Laboratories*

relies heavily on an earlier Second Circuit decision, *Johnson Chemical Co. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), which held that a Rule 41(a)(1)(i) dismissal-as-of-right precludes subsequent consideration of a Rule 11 sanctions motion. *Johnson Chemical* was explicitly disapproved in *Cooter & Gell*. In addition, *Cooter & Gell* cites approvingly a case in direct conflict with *Barr Laboratories -- Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988) -- for the proposition that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under either Rule 41(a)(1)(i) or Rule 41(a)(1)(ii). *Cooter & Gell*, 110 S.Ct. at 2455. In sum, in light of this Court's *Cooter & Gell* decision, there simply is no current conflict among the lower federal courts regarding Rule 41(a)(2) warranting review by the Court.

B. Evidentiary Hearings

The Fourth Circuit held in this case that an evidentiary hearing is not absolutely required whenever a Rule 11 motion raises disputed factual issues, even if a violation of Rule 11's "improper purpose" prong is alleged. *Kunstler*, 914 F.2d at 521. Rather, the Fourth Circuit enumerated several factors that district courts should consider in determining whether the existence of disputed factual issues requires an evidentiary hearing to be conducted. *Id.* at 519-20.

The Fourth Circuit's position on evidentiary hearings does not place it in conflict with the holdings of any other court of appeals, Petitioners' claims to the contrary notwithstanding. The holdings in none of the five court of appeals cases cited by Petitioner Kunstler are in conflict with the Fourth Circuit.

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987), not only is not in conflict with the Fourth Circuit but actually is relied on by the Fourth Circuit in *Kunstler* as the basis for its guidelines for determining when an evidentiary hearing is needed. Similarly, there is no conflict between *Kunstler* and the Third Circuit's decision in *Jones v. Pittsburgh National Corp.*, 899 F.2d 1350 (3rd Cir. 1990). Far from laying down a mandatory requirement for evidentiary hearings whenever Rule 11 motions raise disputed factual issues, *Jones* held:

> Given the permutations inherent in fee applications and response thereto, any rigid rule [regarding the procedural rights that a court must afford to the target of a fee request] would, to say the least, be undesirable. The circumstances must dictate what is required. . . . [¶] [W]e think a district court *in the exercise of its sound discretion* must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution requires further proceedings, including the need for an evidentiary hearing.

Id. at 1358, 1359 (emphasis added).

Each of the other three cases cited by Petitioner Kunstler was discussed by the Fourth Circuit in its decision below and is not in conflict with that decision. The Sixth Circuit stated in passing in *Invst Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 405 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987), that the target of a Rule 11 motion had no cause for complaint because he "was afforded notice and opportunity for hearing, as required by due process," but the decision

makes clear that the required "hearing" need not necessarily be an evidentiary hearing. Indeed, even though the attorney was charged with violating the "improper purpose" prong of Rule 11, he was afforded no evidentiary hearing until after he had already been found to be in violation of Rule 11 and the only remaining issue was the amount of the sanction to be imposed. *Id.* at 400-01

Two Seventh Circuit decisions, *Brown v. National Board of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986), and *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206 (7th Cir. 1985), stated in passing that an evidentiary hearing is required when a motion for sanctions alleges a violation of the "improper purpose" prong of Rule 11. However, the statements are *dicta*, since neither case involved an "improper purpose" allegation, and both cases upheld district court decisions to award Rule 11 sanctions without first holding evidentiary hearings. Certainly, neither decision supports Petitioners' broad claim that an evidentiary hearing is required whenever a disputed factual issue arises in a Rule 11 proceeding, since the Seventh Circuit *dicta* cited by Petitioners is explicitly limited to only one of the three types of possible Rule 11 violations.[3]

In the absence of any conflict between the Fourth Circuit's holding regarding Rule 11 evidentiary hearings and the holding of any other court of appeals, further review by this Court is unwarranted.

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[3] The language in *Brown* and *Rodgers* cited by Petitioners relates to Rule 11 claims based on allegations that the papers in question were filed for an "improper purpose." Rule 11 also prohibits filings not "well grounded in fact" and filings not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

II. THE FOURTH CIRCUIT'S RULE 11 HOLDINGS WERE PLAINLY CORRECT

A. A Defendant Who Fails Expressly To Reserve His Right To Seek Rule 11 Sanctions Prior to a Rule 41(a)(2) Dismissal Does Not Thereby Waive His Right to Sanctions

Petitioners contend that the Federal Rules prohibit a defendant from filing a motion for Rule 11 sanctions following a Rule 41(a)(2) dismissal unless the defendant -- prior to dismissal -- expressly reserves the right to seek sanctions. Petitioners' contention is supported neither by the text of Rule 41(a)(2) nor by the purposes underlying that rule.

First, Rule 11 imposes a mandatory requirement on district courts to impose sanctions on Rule 11 violators, and the violation is not expunged by a voluntary dismissal. As this Court noted in *Cooter & Gell*, "In order to comply with Rule 11's requirement that a court 'shall' impose sanctions '[i]f a pleading, motion or other paper is signed in violation of this rule,' a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action." *Id.* at 2455. Petitioners' argument undermines the mandatory nature of Rule 11 sanctions by severely restricting the conditions under which they can be imposed on Rule 11 violators. Nothing in the language of Rule 41(a)(2) warrants such a result.

Second, Rule 41(a) was adopted as a means of limiting a plaintiff's ability to dismiss an action, not to protect plaintiffs from sanction awards. Prior to adoption of Rule 41(a), liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right up until the entry of the verdict. *See Cooter & Gell*, 110

S.Ct. at 2456. Defendants could be harassed into accepting settlements by plaintiffs who repeatedly dismissed (often on the eve of trial) and refiled the same cause of action. Rule 41(a) eliminated such abuse; under Rule 41(a), once an answer or summary judgment motion has been filed, a plaintiff may not dismiss his suit voluntarily without the consent of either the district court or the plaintiff. It is doubtful that a rule designed to prevent abuses by plaintiffs was also intended to protect plaintiffs from Rule 11 sanctions.

Third, Petitioners should not be heard to argue that they might not have sought a Rule 41(a)(2) dismissal had they known that Respondents intended to seek Rule 11 sanctions. Petitioners never asked the Court of Appeals to permit them to withdraw their voluntary dismissal, nor have they sought such relief from this Court. Nor could they have withdrawn their dismissal as a result of the Rule 11 motion, because Rule 11 sanctions are not "terms and conditions" of dismissal within the meaning of Rule 41(a)(2). *See Cooter & Gell*, 110 S.Ct at 2456 (a prohibition against refiling of a complaint as a sanction for a Rule 11 violation is not a "term or condition" of dismissal within the meaning of Rule 41(a)(2)). Any sanctions imposed upon Petitioners are not "terms and conditions" of dismissal because a Rule 11 violation is complete as soon as the offending pleading, motion, or other paper has been filed, and thus Petitioners would have been subject to the same sanctions regardless whether they went ahead with their voluntary dismissal. Accordingly, Petitioners have not been prejudiced in any way by the filing of a Rule 11 motion after dismissal of the underlying lawsuit.[4]

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[4] Respondents' delay in informing Petitioners of their intent to seek Rule 11 sanctions -- from May 2, 1989 (the date of Petitioners' (continued...)

Petitioners' Rule 41(a)(2) argument boils down to a claim that as a matter of policy, Rule 11 motions are best handled early on in the course of litigation rather than after its conclusion. There is something to be said for a policy of encouraging parties to notify opposing parties of potential Rule 11 claims early on in the litigation; such warnings may on occasion cause the erring party to mend his ways.[5] However, in this case, Respondents did not delay inordinately in providing notification of their intentions; indeed, the entire lawsuit encompassed a period of only three months, and Respondents filed their Rule 11 motion within six weeks after dismissal of the lawsuit. Accordingly, general policy arguments in support of early notification of Rule 11 violations are insufficient to support a finding that the District Court abused its discretion by imposing Rule 11 sanctions in this case.

In sum, Petitioners' claim that Rule 41(a)(2) proscribes the award of Rule 11 sanctions under the facts of this case lacks foundation either in the language or purposes of Rule 11 and Rule 41(a)(2).

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[4](...continued)
voluntary dismissal) until, at the latest, June 13, 1989 (the date on which Respondents filed their Rule 11 motion) -- also did not prejudice Petitioners. Since Petitioners ceased litigating the case by May 2, 1989, an earlier notification would have done nothing to reduce the size of potential Rule 11 sanctions by reduucing the level of legal fees incurred. *Cf. In re Yagman*, 796 F.2d 1165, 1183-84 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 450 (1987)(wasteful two-year lawsuit might have been avoided if district court had earlier warned plaintiff of frivolous nature of lawsuit).

[5] On the other hand, hearings on Rule 11 motions generally should not be permitted to interfere with ongoing litigation. Thus, the Advisory Committee Notes on Rule 11 indicate that "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of litigation."

B. The Fourth Circuit's Guidelines Regarding When Evidentiary Hearings Are Appropriate in Rule 11 Proceedings Do Not Violate Petitioners' Due Process Rights

Respondents filed their motion for Rule 11 sanctions on June 13, 1989. Petitioners thereafter had ample opportunity to respond to the motion. Petitioners filed a lengthy legal memorandum in opposition to the motion and subsequently filed a motion -- supported by another lengthy legal memorandum -- seeking Rule 11 sanctions against Respondents' counsel for having filed the initial Rule 11 motion. The District Court conducted a lengthy oral argument on both motions on September 8, 1989. However, the District Court declined Petitioners' request to conduct an evidentiary hearing; rather, both sides submitted evidence in the form of written affidavits. The District Court then issued a lengthy opinion on September 29, 1989 that explained in detail the bases of the court's decision to impose sanctions against Petitioners. *Amici* submit that, contrary to Petitioners' contention, the Fourth Circuit did not err in holding that Petitioners were provided all the process they were due under the Fifth Amendment.

The Advisory Committee Notes to Rule 11 recognize that due process consideration come into play with regard to the imposition of Rule 11 sanctions against parties and/or attorneys:

> The procedure [employed in handling a Rule 11 motion] obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction

> under consideration. In many situations the judge's participation in the proceeding provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> To assure that the efficiencies achieved through more effective operation of the pleadings regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, *the court must to the extent possible limit the scope of sanction proceedings to the record.* Thus, discovery should be conducted only by leave of court, and then only in extraordinary circumstances. (Emphasis added.)

Accordingly, it appears that the drafters of Rule 11 contemplated that targets of Rule 11 motions should normally be afforded the *minimum* amount of procedural protections that is due under the Fifth Amendment's Due Process Clause. The drafters believed that providing more elaborate procedures would defeat the purposes of Rule 11 by multiplying the costs of satellite litigation over the imposition of sanctions.

The guidelines established by the Fourth Circuit for determining when an evidentiary hearing is required in a Rule 11 proceeding are fully in accord with the Advisory Committee Notes. While the Fourth Circuit recognized that the existence of disputed factual issues in a Rule 11 proceeding may suggest that an evidentiary hearing should be conducted, the court declined to establish a hard-and-fast rule requiring evidentiary hearings in all such cases but rather left the decision whether to conduct a hearing to the sound discretion of the district judge. *Kunstler*,

914 F.2d at 521. In light of the concern of the Advisory Committee that satellite Rule 11 litigation be avoided, such a hard-and-fast rule would have been unwarranted.

This case well illustrates why a rule requiring evidentiary hearings whenever disputed fatual issues arise would be unworkable and would add little to the fact-finding process. All of the direct evidence that would have been submitted at an evidentiary hearing was made available to the District Court in the form of affidavits. An evidentiary hearing undoubtedly would have assisted the District Court somewhat in its fact-finding function: an evidentiary hearing would have provided the court with an opportunity to observe the demeanor of witnesses and to hear their testimony being cross-examined. However, the District Court had a reasonable basis for making credibility determinations based on the inherent plausibility of conflicting affidavits. Moreover, the assistance that a hearing would have provided to the fact-finding process was small in comparison to the costs that would have been incurred in such a hearing. Had the district court permitted an evidentiary hearing in this case, the parties were prepared to call scores of witnesses, in effect conducting a trial on the merits. If even half of those individuals whose affidavits were attached to the parties' briefs had testified at an evidentiary hearing, the hearing could have lasted for weeks. The costs of such proceedings would quickly discourage the filing of motions for Rule 11 sanctions, thereby eliminating Rule 11 as an effective deterrent to abusive litigation practices.[6]

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[6] This Court's due process case law recognizes that the costs of imposing a particular procedural safeguard may properly be considered in determining whether the safeguard should be constitutionally mandated. For example, the Court stated in Mathews v. Eldridge, 424 U.S. 319, 348 (1976): "When evaluating what process is due there comes a time when the benefit of an additional safeguard to the

(continued...)

The Fourth Circuit's determination that the District Court did not abuse its discretion in declining to conduct an evidentiary hearing under the facts of this particular case is not of sufficient importance to warrant review by this Court; that determination was sufficiently case-specific that further review would be unlikely to provide useful guidance in future Rule 11 proceedings.

Nonetheless, the Fourth Circuit's determination that the District Court did not abuse its discretion clearly was correct. The Fourth Circuit noted that the record contained substantial evidence of violations of all three prongs of Rule 11. *Kunstler*, 914 F.2d at 522. Thus, while the Fourth Circuit found that "the number of credibility determinations which the [district] court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value," the Fourth Circuit found that -- even discounting evidence that was the subject of credibility determinations -- there was more than enough evidence to sustain the District Court's finding that Petitioners had violated Rule 11.

Significantly, before the Fourth Circuit Petitioners challenged the failure to conduct an evidentiary hearing only as that failure related to the "improper purpose" prong of Rule 11. Petitioners Fourth Circuit Brief at 46. This Petition marks the first occasion on which Petitioners have expanded their due process argument to encompass an alleged right to evidentiary hearings on the "well grounded in fact" and "warranted by existing law" prongs

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[6](...continued)
individual affected by the government action, and to society in terms of increased assurance that the action is just, may be outweighed by the cost."

of Rule 11. This Court should not review the decision below where the claims now pressed by Petitioners were were not addressed to the lower courts.

In sum, the Fourth Circuit's refusal to mandate evidentiary hearings whenever disputed factual issues arise in Rule 11 proceedings, and its decision that the District Court did not abuse its discretion in declining to conduct an evidentiary hearing in this case are clearly correct; accordingly, review of the case by this Court is unwarranted.

CONCLUSION

Amici curiae Washington Legal Foundation, U.S. Senator Jesse Helms, U.S. Representatives Howard Coble and J. Alex McMillan, and the Allied Educational Foundation respectfully request that the Court deny the Petitions for writs of certiorari.

Respectfully submitted,

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Nos. 90-802, 90-807, and 90-1094

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

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and BARRY NAKELL
Petitioners,

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JOE FREEMAN BRITT, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS IN SUPPORT OF PETITIONS

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IN THE
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OCTOBER TERM, 1990

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS FOR LEAVE TO FILE AMICUS BRIEF

The North Carolina Academy of Trial Lawyers hereby moves the Court, pursuant to Rule 37.2 of this Court's Rules, for leave to file the annexed Brief Amicus Curiae of the North Carolina Academy of Trial Lawyers in Support of Petitioners. Petitioners consent to the filing of the amicus brief; respondents do not oppose this motion for leave to file, but do not consent to it.

The North Carolina Academy of Trial Lawyers is a voluntary bar association of more than 3000 North Carolina lawyers who represent persons who have suffered civil injury or face criminal prosecution. The Academy has appeared before numerous courts as amicus curiae in both criminal and civil cases.

The interest of the Academy in this matter is that the district court imposed Rule 11 sanctions of $122,834.28 against public interest lawyers representing Native Americans complaining of racial and social injustice in Robeson County, North Carolina. While the Fourth Circuit vacated this award and remanded for further consideration of the nature and extent of sanctions, it affirmed the finding that petitioners had violated Rule 11 and should be punished. The Academy and its members, who have often represented the oppressed in unpopular causes, are concerned that Rule 11 has been invoked to chill civil rights litigation and deprive the underprivileged

of access to the courts. See S. Burbank, Studies of the Justice System: Rule 11 in Transition -- the Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (1989).

The Academy is particularly troubled by the Fourth Circuit's approval of the procedures employed by the district court, substantially limiting the due process rights of attorneys, notwithstanding the law in other circuits. Since Rule 11 was amended, federal district courts in North Carolina have issued more than twenty published Rule 11 decisions; unpublished decisions abound. For North Carolina attorneys, the prospect of facing a Rule 11 motion is no longer simply a possibility; it has become a probability. As a result, the Academy's members have a personal interest in seeing that the Fourth Circuit's decision in this case is reversed and they are, in the future, afforded the same due process afforded to attorneys in other jurisdictions. In particular, the Academy is seeking to file

this brief in order to raise a due process question not addressed by any other party: Whether attorneys have a right to be heard on the nature and extent of sanctions imposed. The Fourth Circuit held in this case that there was no such general right.

As an organization of attorneys, who must practice in over-crowded courts and who are repeatedly confronted with settlement and dismissal decisions, the Academy is also concerned that the Fourth Circuit's opinion will mean that, unlike the practice followed in the Second and Third Circuits, actions filed and closed in the Fourth Circuit will have no definite or conclusive end -- but will always remain ripe for resurrection and further litigation as to belated and unforeseen sanctions motions.

For these reasons, the Academy requests leave to file its amicus brief.

Respectfully submitted,

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March 25, 1991.

QUESTIONS PRESENTED

In addition to the questions set forth in the petitions, this matter presents the following question:

> May a district court impose monetary sanctions for violation of Rule 11 based on the movant's attorneys' fee statements without affording the sanctioned party any opportunity to respond to them or otherwise address the issue of the nature and extent of sanctions?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NOS. 90-802, 90-807, and 90-1094

WILLIAM M. KUNSTLER, LEWIS PITTS, and BARRY NAKELL,
Petitioners,

v.

JOE FREEMAN BRITT, et al.,
Respondents.

BRIEF AMICUS CURIAE OF THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS IN SUPPORT OF THE PETITIONS

INTEREST OF THE AMICUS

The interest of the North Carolina Academy of Trial Lawyers is set forth in the accompanying motion for leave to file.

STATEMENT OF THE CASE

The Fourth Circuit affirmed in part an order of the Eastern District of North Carolina imposing Rule 11 sanctions on plaintiffs' counsel, the petitioners in this

proceeding. The district court issued sanctions upon defendants' motion, filed six weeks after the court entered an order granting plaintiffs' unopposed motion for dismissal with prejudice.

Petitioners brought this action under 42 U.S.C. § 1983 on behalf of a number of Native Americans who claimed they were being harassed by law enforcement officers of Robeson County, North Carolina. After three months of litigation, the primary issues in the case became moot. Plaintiffs therefore decided to terminate the action.

Petitioner Barry Nakell telephoned his counterpart, defense counsel Joan H. Byers. In response to Mr. Nakell's request that she enter into a stipulation dismissing the case pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Ms. Byers stated that she would need some time to consider the matter. In a return call, Ms. Byers advised Mr. Nakell that, although defendants had no

objection to a voluntary dismissal, obtaining authorization to enter into a stipulation would be time consuming and inconvenient. She suggested that plaintiffs simply file a motion for dismissal stating that defendants had no objection.

Accordingly, plaintiffs filed a motion for voluntary dismissal with prejudice under Rule 41(a)(2). The motion stated: "[c]ounsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do not object to the Court granting it."

The district court granted the motion on May 2, 1989. The court's order did not reserve jurisdiction for collateral proceedings. Nor did the order in any way contemplate the possibility of Rule 11 sanctions.

Similarly, in negotiating the terms of the lawsuit's termination, Ms. Byers did not mention any potential Rule 11 motion. Indeed, the record fails to indicate any

suggestion of a forthcoming Rule 11 motion from the day the complaint was filed until six weeks after it was dismissed.

Then, on June 13, 1989, out of the blue, defendants filed a broadside motion for Rule 11 sanctions -- resurrecting all of the legal and factual issues of a case long thought lifeless. Petitioners, surprised by this rather bizarre turn of events, asked defense counsel to meet with them to discuss the matter. Their response: Tell it to the Judge.

With no explanation forthcoming from their adversaries, petitioners turned to the court for assistance. They moved for an evidentiary hearing and an opportunity to conduct discovery on the issue. The court simply ignored their requests.

Ultimately, the district court decided the Rule 11 motion entirely from affidavits and oral argument. No

witnesses were sworn, cross-examined, or "eyeballed." By comparing contradictory affidavits and relying on newspaper clippings, the court resolved issues of fact, determined credibility, and eventually arrived at the ultimate factual finding underlying its decision: "[T]he entire complaint is tainted by improper purpose. . . ." (Order at 19)

For example, the district court based its critical finding that "the civil action was instituted as leverage in these extradition proceedings" (Order at 8) on the affidavit of a New York lawyer:

> Neal P. Rose, a New York District Attorney, has filed an affidavit with the court stating that Mr. Pitts offered to dismiss this civil action as part of the plea bargain and that Mr. Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact.

(Order at 8)[1] The district court failed to mention in its decision, however, that it had before it the affidavit of a second New York lawyer, Alan Rosenthal, who remembered things quite differently from Mr. Rose:

> I have read Mr. Rose's affidavit and take issue with his subjective determination that Mr. Pitts implied that there was no factual basis for the civil lawsuit referred to above.
>
> I was local counsel for Timothy Jacobs during his extradition proceeding in New York. In that case I served as local counsel to Lewis Pitts, Esq. During the numerous

---

[1]In fact, Mr. Rose's affidavit stated:

> Deponent recalls at least one occasion during the course of these extradition proceedings in New York State when E. Lewis Pitts stated in words to the effect that the civil suit commenced in Federal Court North Carolina [sic] had been commenced as leverage to bring about a favorable plea bargain for Timothy A. Jacob, and the clear implication of Mr. Pitts' remarks was that there was no factual basis for the civil lawsuit which had been commenced.

(Rose aff. ¶ 8; emphasis added)

> conversations I had with Mr. Pitts about the impending civil lawsuit, referred to above, never once was it ever directly stated, or even implied, that there was no factual basis for the civil lawsuit.
>
> At no time did Mr. Pitts say anything to imply that the lawsuit commenced in Federal Court in North Carolina was merely commenced for leverage to bring about a favorable plea bargain for Mr. Jacobs, nor did he imply that there was no factual basis for the civil lawsuit.
>
> I was present during all of the Chambers conferences conducted between District Attorney Rose, Judge O'Brien and Mr. Pitts.
>
> During several of these conferences the District Attorney took such an antagonistic posture towards Mr. Pitts so as to refuse to speak to him. I believe that Mr. Rose's personal antagonism towards Mr. Pitts has affected his ability to accurately represent any implications of Mr. Pitts' remarks.

(Rosenthal aff. ¶¶ 5-9; emphasis added) This attorney's affidavit, which flatly contradicted the Rose affidavit, was

totally ignored by the district court.[2]

A clearer example of a disputed issue of material fact cannot be imagined. Yet, based solely on these typewritten words, the court apparently determined that (1) the Rose affidavit was true in its entirety, (2) the Rosenthal affidavit was so inherently incredible as to be unworthy of mention, and (3) petitioners, therefore, were using the civil suit as leverage.

This example is not isolated. Without having heard a single witness, the district court offered its conclusions ten times during the twenty-four page order, as to the "purpose," "motive," "motivation," or "intent" of plaintiffs' counsel. (Order at 6, 7, 9, 10, 12, 19) Petitioners had defended themselves vigorously and "[t]he

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[2]Indeed, the district court disregarded all of the evidence submitted by petitioners: "Counsel has submitted a stack of affidavits and exhibits . . . . The court has reviewed this material and is not impressed." (Order at 19)

affidavits submitted by counsel strongly disputed the court's conclusions . . . ." In re Kunstler, 914 F.2d 505, 520 (4th Cir. 1990). They offered legitimate explanations for their litigation decisions. The district court chose to condemn these affidavits -- and not the State's, filed to obtain substantial fees -- as "self-serving." (Order at 19) Time after time, it rejected petitioners' facially plausible reasons as "difficult to accept," "not credible," and "absurd." (Order at 8, 10, 11, 12)

In reaching this conclusion of fabrication, the district court pointed to events that were equally susceptible of a sinister interpretation and an innocent rationale. Each time, it drew the inference most favorable to the moving party. According to the court, "[t]he most damning evidence of all" was the voluntary dismissal, which it found more consistent with filing suit for publicity than with petitioners' sworn explanation that the interference had

substantially stopped. (Order at 9, 11) Similarly, it condemned as "astonishing conduct," amounting to intimidation, petitioners' forwarding a copy of the complaint to the trial judge -- although the same judge had admittedly asked them in a letter to "write me explaining what you do." (Order at 9)

The court's decision was thus riddled with multiple findings that petitioners or other lawyers were untruthful, determinations of motive or intent from evidence equally consistent with appropriate conduct, and resolutions of disputed issues of fact from conflicting affidavits.[3] (Order at 6-12) Necessarily, such determinations comprised a substantial basis of the court's conclusion that the complaint

---

[3]The complex factual disputes underlying the matter are evidenced by respondents' February 18, 1991 motion that this Court double the page limitation permitted for responsive briefs on the ground that "respondents substantially disagree with the facts and law as presented . . . ."

violated Rule 11.

Apparently having reached its conclusions shortly after the September 8, 1989 oral argument, the court wrote defense counsel and asked them tc set forth their time charges. Defense counsel immediately submitted affidavits averring attorneys' fees and expenses totalling $92,834.28. Defense counsel signed and served copies of these affidavits by mail on September 27, 1989.

On the very next day, September 28, 1989, the district court agreed with every penny of defense counsel's fees, held that the fees were reasonable, and imposed them as a sanction against plaintiffs' counsel. Petitioners had no opportunity at all to question the amount of such fees, the fact that one attorney had billed exactly "5.0 hours" on 57 of 93 days, the reasonableness of the fees under the circumstances, or whether the fees could have been mitigated.

In addition to the attorneys' fees sanctions, the district court found that petitioners' conduct was so "egregious" as to warrant imposition of "punitive sanctions" in the amount of $10,000 each. As a final sanction, the court ordered that, until the entire sanction of $122,834.28 plus interest was paid, petitioners would be barred from practicing before it. (Order at 23) Petitioners, who had no warning that such "punitive sanctions" might be forthcoming, similarly had no opportunity to address this additional punishment.

On appeal, the Fourth Circuit affirmed the finding that petitioners had violated Rule 11. In holding that sanctions were appropriate under all three prongs of Rule 11 (improper purpose, ungrounded in fact, unfounded in law), the circuit court ruled that the district court had properly reached its decision without an evidentiary hearing. While such an evidentiary hearing "would have

been of value" according to the Fourth Circuit, "[d]ue process does not require an evidentiary hearing before sanctions are imposed." 914 F.2d at 522, 521.

The Fourth Circuit reversed the district court's decision, however, on the extent of sanctions. The court ruled that the failure to provide petitioners any opportunity at all to contest this issue violated due process: "Under the facts of this case, particularly the amount of the sanction, due process requires that appellants have some opportunity to contest the amount of the sanction imposed." 914 F.2d at 522. The court limited this requirement, however, to this particular case. Id.

The Fourth Circuit set aside the award of sanctions, and remanded the case for reconsideration of the issue in light of certain guidelines. On remand, petitioner would be given an opportunity to contest the type and amount of sanction. 914 F.2d at 522. Such sanctions, which should

be the least severe adequate to accomplish Rule 11's goal of deterring future litigation abuse, could not include the "punitive sanctions" of $10,000 per attorney. 914 F.2d at 525.

REASONS FOR GRANTING THE WRIT

In the past eight years since Rule 11 was amended, there have been more than 1000 reported decisions addressing Rule 11. Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1143 n.3 (9th Cir. 1990) (en banc). Nevertheless, the circuit and district courts continue to struggle with fundamental procedural questions. As one commentator has pointed out, "[t]he rule gives very little direct guidance . . . ." 5A Wright & Miller, Federal Practice and Procedure § 1337 at 120.

This Court has addressed four of the outstanding procedural questions in three recent decisions: whether law firms (as opposed to individual attorneys) may be

sanctioned, the effect of a unilateral voluntary dismissal under Rule 41(a)(1)(i), the standard for appellate review, and the standard to be applied when sanctioning parties. Unresolved, however, are two even more basic issues: (1) the amount of due process to be afforded attorneys prior to imposing sanctions; and (2) the ability of Rule 11 to upset the presumption of finality of judgments.

The lower courts have been unable to reach a consensus on these two questions although the stakes at issue are high. Sanctions are often substantial: In this case, sanctions were $122,834.28 plus interest; another court has imposed sanctions of $443,564.66. Brandt v. Schal Associates, Inc., 131 F.R.D. 512, 518 (N.D. Ill. 1990). Yet, the district courts have received no definitive guidelines as to the amount of due process required prior to imposing punishment of such magnitude. Due process is administered on an ad hoc basis.

The stakes, though tremendous for attorneys, are also high for the courts. They have an interest in assuring that cases once apparently resolved -- whether by settlement or decree -- do not rear their heads again sometime in the indefinite future. Cases must have an end. The Fourth Circuit's decision, however, in direct conflict with the Second and Third Circuit rules, permits Rule 11 motions to be filed without notice a substantial period of time after an unopposed court-ordered dismissal with prejudice. A Pennsylvania federal judge's final order is more final than a North Carolina federal judge's final order.

Given (1) the deluge of Rule 11 motions, (2) the frequency with which these basic procedural questions arise; and (3) the lower courts' inability to reach a definitive resolution of these issues, this Court should grant the petitions for writ of certiorari.

I. THE DECISION BELOW DIRECTLY CONTRADICTS DECISIONS OF THE SECOND AND THIRD CIRCUITS PRESERVING THE PRESUMPTION OF FINALITY OF COURT-ORDERED DISMISSALS

The rule adopted by the Fourth Circuit in the decision below flatly contradicts the established precedents in the Second and Third Circuits. In the Fourth Circuit, a district judge who, without any objection from the parties, has signed an unqualified order finally dismissing an action with prejudice -- thereby presumably bringing the litigation to an end -- may later be confronted with a reopening of the entire matter by virtue of an unforeseen Rule 11 motion. Every closed case, whether "permanently" concluded by litigation or by settlement, harbors the specter of an eventual Rule 11 motion. In the Second and Third Circuits, district judges do not face such prospects. Barr Laboratories, Inc. v. Abbott Laboratories, 867 F.2d 743 (2d Cir. 1989); Mary Ann Pensiero, Inc. v. Lingle, 847

F.2d 90, 100 (3d Cir. 1988).

Recognizing in part the inconsistency it was creating, the Fourth Circuit made an express effort to distinguish the facts of Barr. The court was apparently unaware of Lingle, however. It proclaimed: "No court has adopted a rule prohibiting a motion for Rule 11 sanctions after a dismissal with prejudice under Rule 41(a)(2)." 914 F.2d at 512.

In fact, the Third Circuit had done just that: "[W]e adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment." Lingle, 847 F.2d at 100. Emphasizing the "interest of judicial economy," the Third Circuit noted two significant practical problems with entertaining unforeseen Rule 11 motions in closed cases:

> In the district court, resolution of the issue before the inevitable delay of the appellate

> process will be more efficient because of current familiarity with the matter. Similarly, concurrent consideration of challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions.

847 F.2d at 99. Citing the Advisory Committee Note urging prompt notification of an intent to seek sanctions, the court further enjoined litigators in its courts to file motions well before cases were formally disposed of -- "as soon as practicable after discovery of the Rule 11 violation." 847 F.2d at 99-100, citing Schwarzer, Sanctions Under the New Federal Rule 11: A Closer Look, 104 F.R.D. 181, 194-95 (1985).

Courts within the Third Circuit have followed Lingle in rejecting belated Rule 11 motions in closed cases. Muller v. Temura Shipping Co., Ltd., 15 Fed. R. Serv. 3d 19 (E.D. Pa. 1989) (motion filed after a settlement); Roe v. Operation Rescue, No. 88-5157, 1989 West Law 66452

(E.D. Pa. June 19, 1989) (motion filed after dismissal).

The Fourth Circuit's analysis of Barr is of little more assistance than its ignorance of Lingle. The sole distinction the court could identify was that defense counsel in Barr also signed the dismissal papers:

> The present case is different from Barr because it does not involve a stipulated dismissal, which requires opposing counsel to sign the dismissal order.

914 F.2d at 512. In its zeal to emphasize the absence of a defense lawyer's "John Hancock," however, the Fourth Circuit averted its eyes from a signature of far greater significance. Both in Barr and the decision below, a federal district court judge signed the orders of dismissal.

Other than the fact that the defense lawyer in this case considered it inconvenient to add her signature below that of a federal judge -- although she "did not object" to his order -- there is little difference between Barr and this case. Both involved Rule 11 motions filed by defendants

weeks after a district court had ordered the actions dismissed with prejudice. Compare 867 F.2d at 748 with 914 F.2d at 513. And in both, the defendants had neither objected to the dismissal nor given any "indication that Rule 11 sanctions would be sought." 867 F.2d at 748; compare 914 F.2d at 512.

Based on these facts, the Second Circuit held that "[i]t is plain that Abbott's conduct lulled Barr into a false sense of security and that Barr was under the impression that the action was finally and conclusively terminated for all purposes." 867 F.2d at 748. That court thus affirmed Judge Duffy's decision that he had "no jurisdiction" to impose Rule 11 sanctions. Upon virtually the same facts, the Fourth Circuit held just the opposite.

In a final effort to distinguish Barr, the Fourth Circuit invoked this Court's recent decision in Cooter & Gell v. Hartmarx, 110 S.Ct. 247 (1990). In Cooter &

Gell, this Court held that a plaintiff's unilateral voluntary dismissal without prejudice in the face of a pending Rule 11 motion does not divest a district court of jurisdiction to resolve the pending motion. Thus, Cooter & Gell, unlike the situation addressed by Barr, Lingle, and this case, did not involve an unexpected Rule 11 motion filed long after an unqualified court-ordered dismissal with prejudice. Cooter & Gell does not address the inter-circuit conflict that the Fourth Circuit has created.[4]

This Court should grant certiorari to resolve this conflict in the circuits. All such disparities regarding the application of the Federal Rules of Civil Procedure bear

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[4]The Fourth Circuit implied that its decision to "decline to extend Barr to dismissals under Rule 41(a)(2)" was a question of first impression. Id. Even had the court been correct, this in itself could constitute sufficient reason to extend certiorari. See American Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression under the LMRDA, we granted certiorari.").

consideration. But when the effect of the conflict is to create jurisdiction in one circuit, resurrect long dead actions, and potentially deluge district courts and former litigants with sanctions motions in cases closed by court order, the matter merits careful scrutiny.

II. THE AMOUNT OF DUE PROCESS AFFORDED UNDER RULE 11 SHOULD NOT VARY FROM COURT TO COURT.

This Court has held that due process requires that one receive, prior to being sanctioned under 28 U.S.C. § 1927, "fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). Lower courts have applied this rationale in the Rule 11 context. The courts have failed to reach any accord, however, as to whether an evidentiary hearing is ever required under any circumstances and whether attorneys are entitled to be heard at all on the nature and extent of Rule 11 sanctions.

A. Due Process for Lawyers Now Varies by Circuit.

The Fourth Circuit held that "[d]ue process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11." 914 F.2d at 521. The court made no exceptions to its blanket rule, even for disputed issues of fact or determinations of credibility.

The guidance provided by the Fourth Circuit to a district court regarding when it might, in its discretion, prefer to hold an evidentiary hearing is minimal:

> When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purpose as well as failure to comply with the first two prongs of Rule 11.

914 F.2d at 520.

All five of those factors were present in this case.

Yet, the court ruled that the district court did not err in refusing to hold an evidentiary hearing. Id. at 521-22. In short, if not this case, when?

Moreover, tying the need for an evidentiary hearing to the size of the sanction puts the cart before the horse. A court does not know whether an evidentiary hearing is necessary until it has already decided, without an evidentiary hearing, to impose "large sanctions."

Fourth Circuit district courts are left with no clue -- and attorneys have no assurances -- as to when an evidentiary hearing must be held.

The other Courts of Appeals have likewise struggled with the question of when a district court must hold an evidentiary hearing before imposing Rule 11 sanctions. The majority appear to have concluded contrary to the Fourth Circuit that an evidentiary hearing on sanctions is essential when there are issues of fact, credibility

determinations, or questions of improper purpose. See, e.g., Jones v. Pittsburgh National Corp., 899 F.2d 1350, 1359 (3d Cir. 1990) (rule "mandates an evidentiary hearing to resolve disputes of material fact when the cold record may not disclose the full story, as here."); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988) ("controverted factual matter . . . might have called for additional procedure"); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 206 (7th Cir. 1985) ("sanctions on bad faith . . . would require a hearing").

In Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (en banc), the court concluded that the factors set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), mandated a hearing in such situations: "[W]hen a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition

of sanctions under limited procedures and the probable value of additional hearing are likely to be greater."[5]

Other courts, however, have reached a contrary conclusion, requiring no evidentiary hearing. See McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir.

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[5]See also Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc) (with regard to Fed. R. App. Proc. 38, if fact issues arise affecting either the amount or whether sanctions should be imposed at all, there must be proceedings beyond oral argument to resolve these issues); Tom Growney Equip. v. Shelby Irrigation Development, 834 F.2d 833, 836 n.6 (9th Cir. 1987) ("in light of the due process violations, we decline to speculate what evidence might have been adduced if there had been proper notice and a meaningful evidentiary hearing"); INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir.), cert. denied, 484 U.S. 927 (1987) ("at the hearing, Garratt's counsel fully cross-examined plaintiff's attorneys about the hours spent and fees charged. Therefore, Garratt was afforded notice and opportunity for a hearing, as required by due process"); Jenson v. Federal Land Bank of Omaha, 882 F.2d 340, 342 (8th Cir. 1989) ("Because we remand the case to give Jenson proper notice, he, of course, must be given a hearing on the issue"); Jones v. Continental Corp., 789 F.2d 1225, 1232 (6th Cir. 1986) ("We therefore agree with Jones's counsel that a hearing to resolve this factual issue must precede any award of attorney's fees" under 28 U.S.C. § 1927).

1986) ("Nor is [plaintiff] entitled to a hearing on whether sanctions should be imposed or what level of sanctions should apply").

If petitioners had been fortunate enough to be in the First, Third, Seventh, or Eleventh Circuits, they could, for example, have cross-examined Mr. Rose. Or they could have called Mr. Rosenthal to testify as to his vastly different recollection of the events described by Mr. Rose. Presumably Mr. Rosenthal's live testimony would have been more difficult to ignore than his affidavit. Either witness could have potentially eliminated the sole basis for the district court's most significant finding of improper purpose.

At stake is not only petitioners' financial stability, but their very livelihood and reputation. An attorney's stock in trade is his or her "name," reputation, and integrity. An attorney's ability to defend that integrity,

which may determine his or her ability to practice law, should not depend on the identity of the court in which he or she appears. Cf. Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 2771 (1989) (condemning result by which "a different constitutional standard would apply in different States"). Given the ubiquitous nature of Rule 11, guidance from this Court is necessary to establish uniform procedures.

B. The Decisions Below Do Not Comport with this Court's Due Process Decisions and Traditional Notions of Due Process.

Had this been an ordinary summary judgment order awarding $92,000 in compensatory damages and $30,000 in punitive damages -- in which the court, considering only affidavits, had decided disputed issues of fact, resolved conflicting inferences in favor of the non-moving party, and determined credibility and motive -- it would be reversed in short fashion. Rule 11 sanctions, with their

attendant implications for attorneys' careers, are no less deserving of protection from improper summary procedure.

This Court stressed in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), that it was not "authoriz[ing] trial on affidavits". The Court held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions; not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." This Court emphasized again in Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3188 (1990), "Where the facts specifically averred by [the non-moving] party contradict facts specifically averred by the movant, the motion [for summary judgment] must be denied." That is, however, precisely the opposite of what the district court did here -- while punishing the attorneys in the amount of $122,000 and precluding them from practicing

before it.

This Court has also warned courts against drawing inferences of improper motive, in the face of plausible explanations, from purportedly objective evidence. In Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 588 (1986), the Court held "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Likewise, in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 744-45 (1983), this Court barred the NLRB from concluding, prior to a trial, that a lawsuit is "improperly motivated," if there is a "genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts." Indeed, in the analogous situation of awarding attorneys' fees under EAJA, the Court has condemned drawing the inference of a "lack of substantial

justification" -- comparable to the Rule 11 standard -- from "objective indicia" when other innocuous explanations are available. Pierce v. Underwood, 487 U.S. 552, 568 (1988). The plaintiffs contended that the government's willingness to settle on unfavorable terms demonstrated its lack of substantial justification, an analysis identical to the district court's view in this case of petitioners' voluntary dismissal. This Court squarely rejected the plaintiffs' argument:

> Other factors, however, might explain the settlement equally well -- for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements.

Id. Similarly, petitioners offered a reasonable explanation for the dismissal: cessation of the unconstitutional activity. The district court's contrary inference, like the inference in

Pierce, will "penalize and thereby discourage useful" dismissals. There is no reason to treat the punishment of attorneys any differently from attorneys' fee petitions under EAJA.

The Fourth Circuit's dismissal of these due process concerns on the grounds that "the district court's determination that [petitioners'] explanations are not reasonable or believable . . . is not clearly erroneous," 914 F.2d at 520, provides no answer. It is in fact a "strange jurisprudence." Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 2771 (1989). Whether an individual is entitled to a particular procedural protection cannot be determined based on whether a decision is deemed correct based on a record created without that protection. The Fourth Circuit's analysis turns constitutional jurisprudence on its head.

C. The Failure of a Court to Allow a Party to Address the Nature and Extent of Sanctions Violates Due Process.

The district court provided plaintiffs' counsel no opportunity whatsoever to address the nature and extent of the sanctions. The court simply asked for defense counsel's fee records and, the day after receiving them, imposed these fees in their entirety as a sanction. Through this expedited process, the district court failed to afford plaintiffs even the most basic protections of due process.

The Fourth Circuit reversed the amount of sanctions, holding that

> [w]here a court determines that a large monetary sanction should issue, and the amount is heavily influenced by an injured party's fee statements, as was the case here, the court should permit the sanctioned party to examine and contest the injured party's fee statements as an aid to the court's own independent analysis of the reasonableness of the claimed fees.

914 F.2d at 524. Nevertheless, the court held that the

opportunity to respond is not generally required: A district court "may permit a sanctioned party to respond to an opposing party's fee statements in its discretion." Id.

Under the Fourth Circuit's decision, a party being sanctioned has no right to be heard on the nature and amount of the sanction. The attorney will not necessarily be allowed to file a brief discussing the factors relevant to the nature and amount of the sanction; to file any response to a fee affidavit; or to present oral argument. In short, when it comes time to set the sanction, the Fourth Circuit holds that the attorney is entitled to no process.

The case of White v. General Motors Corp., Inc., 908 F.2d 675, 686 (10th Cir. 1990), conflicts with the Fourth Circuit's holding -- even though the Fourth Circuit expressly adopted other portions of the White court's decision. In White, the court acknowledged that due process rights, including the right to be heard, attach to the

question of the reasonableness of the sanction. 908 F.2d at 686. The court imposed a due process floor: "The opportunity to fully brief the issue is sufficient to satisfy due process requirements." Id. The Fourth Circuit's rejection of this right to brief the issue is inconsistent with the Tenth Circuit rule. See also Davis v. Veslan Enterprises, 765 F.2d 494, 500 n.12 (5th Cir. 1985) (due process afforded in Rule 11 case when counsel given nearly two months time to respond to the fee affidavits); Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510 (11th Cir. 1986) (in Rule 37 sanctions case, due process afforded when sanctioned party has an opportunity to challenge the fee affidavits).

Courts awarding attorneys' fees in other contexts never make decisions from one-sided presentations. At a minimum, they require "substantial briefs from both sides." Copeland v. Marshall, 641 F.2d 880, 905 (D.C. Cir. 1980)

(en banc). Usually the party opposing the petition is permitted the opportunity to pursue discovery. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (per curiam) (information obtained in discovery "is essential in the calculation of the fee award and opposing counsel should have access to the information as a matter of right."); McManama v. Lukhard, 616 F.2d 727, 729 (4th Cir. 1980) (fees awarded only "[a]fter permitting discovery, briefing and argument on the issue"). Some courts have required evidentiary hearings to determine the reliability and reasonableness of fees and expenses. See, e.g., Wulf v. City of Wichita, 883 F.2d 842, 876 (10th Cir. 1989) (requiring evidentiary hearing to determine appropriate amount of attorneys' fees); National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (per

curiam) ("[P]rocedural fairness requires that a hearing be held where in the District Court's view material issues of fact that may substantially affect the size of the award remain in well-founded dispute."); Henson v. Columbus Bank and Trust Co., 651 F.2d 320, 330 (5th Cir. 1981) (presence of factual disputes as to the amount of time and duplicative effort requires evidentiary hearing).

There is little distinction between the collateral issue of attorneys' fees and the nature and amount of a Rule 11 sanction. The Fourth Circuit, however, reasoned:

> Because the purposes of sanctions differ from those of attorney's fees, the amount of process due the offending party differs.
>
> The determination of the type or amount of the sanction imposed comes only after the offending party has had an opportunity to defend against the imposition of any sanction. Presumably, a party's interest in the kind and amount of a sanction is of less import than his or her interest in the decision to impose any sanction.

914 F.2d at 523. This is a distinction without a difference.

In attorneys' fees cases, such as Title VII or 42 U.S.C. § 1988, fees are awarded only after the plaintiff has prevailed on the merits. To paraphrase the Fourth Circuit's ruling, the defendant's interest in the amount of the attorney's fee to be awarded is presumably of less import than his interest in the decision that the plaintiff has prevailed on the merits. Nevertheless, defendants are routinely allowed discovery, briefing, and oral argument, and occasionally an evidentiary hearing.[6]

Moreover, it is hardly fair to conclude that an attorney's interest in the nature and amount of the sanction is of such insignificant importance as to require no process. By virtue of this Court's holding in Pavelic & LaFlore v. Marvel Entertainment Group, 493 U.S. ____, 107 L.Ed.2d

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[6]Ironically, had petitioners' clients prevailed, defendants undoubtedly would have taken advantage of all of these procedures. Petitioners, however, are not entitled as a matter of course to comparable protections.

438 (1989), and the improbability of coverage by malpractice insurance, the amount of any monetary sanction will likely come out of the attorney's own pocket. And a law professor's pocket is hardly as deep as a typical Title VII or § 1983 defendant's. More significantly, if the court imposes the sanction of converting a dismissal without prejudice to one with prejudice, the attorney has an overwhelming interest in protecting his clients. See Anders v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986) (in connection with a dismissal under Rule 41(a)(2), "plaintiff deserved an opportunity to respond to defendants' request for dismissal with prejudice.").

Indeed, contrary to the Fourth Circuit's assumption, 914 F.2d at 523, the purpose of sanctions -- to punish and deter litigation abuse -- requires more due process, not less. Only this month, this Court discussed at length the due process implications of punitive damages, which also

have traditionally been used for deterrence and punishment. Pacific Mutual Life Insurance Co. v. Cleopatra Haslip, 59 U.S.L.W. 4157, 4161-63 (U.S. March 5, 1991). The Court noted, "One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 4161.

Here, the lack of guidance has led to just such an extreme result. The lack of procedural protections in the Fourth Circuit gives attorneys good reason to fear further such results, especially when their case involves unpopular views or clients. See Id. at 4171 (O'Conner, J., dissenting) (noting need for additional procedural protections with regard to punitive damages).

Bright-line procedural protections -- such as simply the opportunity to respond in writing -- would go far in

ensuring greater uniformity and fairness in decisions and ease in appellate review. This case presents this Court with the opportunity to provide such guidance to lower courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions should be granted.

Respectfully submitted,

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